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No.....

IN THE

Supreme Court of the United States

October Term, 1980

FORD MOTOR CREDIT COMPANY,

Petitioner,

vs.

JANET CENANCE, *et al.*,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Questions Presented.

1. Under the Truth in Lending Act and the Federal Reserve Board's Regulation Z, is the purchaser of a consumer credit contract evidencing an installment sales transaction a "creditor" at the time the credit sale is consummated, and, if so, does the conspicuous identification of the purchaser on the disclosure statement as the intended assignee of the contract satisfy the creditor identification requirements of Regulation Z?

2. Under the Truth in Lending Act, is the purchaser of a consumer credit contract evidencing an installment sales transaction a subsequent assignee, liable only for disclosure violations that are apparent on the face of the disclosure statement, or an original creditor, liable for all disclosure violations whether or not they are apparent on the face of the disclosure statement?

3. Assuming that the purchaser of a consumer credit contract evidencing an installment sales transaction is a creditor under the Truth in Lending Act and Regulation Z, is the purchaser relieved of disclosure obligations by Section 226.6(d) of Regulation Z?

List of Parties.

Janet Cenance, Plaintiff-Appellee,

v.

Bohn Ford, Inc., Defendant-Appellant,
Ford Motor Credit Company, Defendant-Appellant.

Nicole Antonio, Plaintiff-Appellant,

v.

Canal Motors, Inc., Defendant,
Ford Motor Credit Company, Defendant-Appellee.

Marion Shropshire, Plaintiff-Appellee,

v.

George Thompson Ford, Inc., Defendant-Appellee,

v.

Ford Motor Credit Corporation, Defendant-Appellant.

Solomon Wiggs, Plaintiff-Appellee,

v.

Ford Motor Credit Corporation, Defendant-Appellant.

Jimmy W. Farrell, Plaintiff-Appellee, Cross-Appellant,

v.

Frank Jackson Motors, Inc., d/b/a/ Jackson AMC-Jeep, Defendant-Appellant, Cross-Appellee.

Nicholas Strzelecki, Plaintiff-Appellee,

v.

Terry Ford Company and Ford Motor Credit Company, Defendants-Appellants.

Michael Duane Culver, Plaintiff-Appellee,

v.

Greenbriar Lincoln Mercury Sales, Inc. and Ford Motor Credit Company, Defendants,
Ford Motor Credit Company, Defendant-Appellant.

Dennis Vissichelli, Plaintiff-Appellee,

v.

Terry Ford Company and Ford Motor Credit Company, Defendants-Appellants.

Thomas J. Rogers and Phyliss Rogers, Plaintiffs-Appellees,

v.

Frank Jackson Lincoln-Mercury and Ford Credit Company, Defendants-Appellants.

Nos. 77-2200, 77-3508, 78-2369, 78-2914, 79-1139, 79-1584, 79-2227, 79-2340, 79-2449 and 79-2672.

United States Court of Appeals, Fifth Circuit.

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*Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company. All subsidiaries of Ford Motor Credit Company are either wholly owned by Ford Motor Credit Company or are wholly owned by Ford Motor Credit Company and other subsidiaries of Ford Motor Company. Ford Motor Credit Company may be considered an affiliate of the subsidiaries of Ford Motor Company listed in Appendix F.

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October Term, 1980

FORD MOTOR CREDIT COMPANY,

Petitioner,

vs.

JANET CENANCE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Ford Motor Credit Company (herein "Ford Credit"), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in these consolidated cases.

Opinions Below.

The opinion of the Court of Appeals is reported at 621 F.2d 130 and is reprinted in Appendix A. The opinions of the District Courts are reprinted in Appendix B.

Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was rendered on July 9, 1980. On July 22, 1980, Petitioner filed a petition for rehearing and rehearing *en banc* which

was denied on October 22, 1980. This Petition was filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The basis of jurisdiction in the District Court was 15 U.S.C. § 1601 *et seq.*

Statutory Provisions and Regulations Involved.

Set forth in Appendix C

Statement of the Case.

The facts in these nine consolidated cases are typical of installment sales financing transactions as practiced in this country for more than fifty years. In each case, a buyer entered into an installment sale transaction with an automobile dealer in order to purchase an automobile. The dealer negotiated the terms of the sale with the buyer with respect to the price, down payment, finance charge, repayment and other credit terms. Before completing the sale, the dealer submitted the buyer's credit application to Ford Credit. Ford Credit indicated to the dealer that the buyer satisfied Ford Credit's credit standards. A Retail Instalment Contract was then signed by the dealer and the buyer. The contract was thereafter tendered by the dealer to Ford Credit for possible purchase. When Ford Credit approved the terms of the contract, it purchased the contract and became the owner and holder of the contract by assignment from the dealer.

The buyer dealt only with the automobile dealer, and not with any agent or representative of Ford Credit.[1] Ford Credit

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[1]The records show the following facts are uncontroverted:

(a) No agreement existed between Ford Credit and any seller requiring Ford Credit to accept the assignment of any of the installment contracts tendered to Ford Credit for purchase by the seller. (*See Wiggs* Tr. 146; *Shropshire* Tr. 21; *Strzelecki* Tr. 1, 31-43; *Vissichelli* Tr. 16, 29-41; *Farrell* Tr. 11, 15, 53; *Culver* Tr. 52)

took no part in the negotiations between the buyer and the dealer and had no contact with the buyer until after the credit transaction had been consummated and the contract had been submitted to and purchased by Ford Credit. Ford Credit did not assist the dealer in completing the contract after the dealer and the buyer agreed upon the terms of the sale.

Ford Credit prepared and supplied the dealer with blank forms of Retail Instalment Contracts for completion by the dealer. The contract served as both the agreement of the parties and the disclosure statement required by the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (herein "the Act"), and Regulation Z, 12 C.F.R. § 226 (herein "the Regulation"), promulgated by the Board of Governors of the Federal Reserve Board (herein "the Board"). Each Retail Instalment Contract contained on the face of the contract and directly adjacent to the buyer's signature the following reference to Ford Credit:

> "The foregoing Contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in

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(b) There was no obligation on the part of any seller to assign to Ford Credit any contract as to which Ford Credit had approved the buyer's credit. In fact, Ford Credit has rejected the purchase of installment contracts tendered to it for purchase by sellers even in cases in which Ford Credit had previously approved the buyer's credit application. (*See Wiggs* Tr. 146; *Shropshire* Tr. 66-67; *Strzelecki* Tr. 1, 31-43; *Vissichelli* Tr. 16, 29-41; *Farrell* Tr. 11, 15, 53; *Culver* Tr. 52; *Rogers* Tr. 48)

(c) With the possible exception of Bohn Ford, as to which no evidence was heard, each seller used several financial institutions other than Ford Credit to purchase installment contracts. See, *Shropshire* Tr. 68. In *Antonio*, the parties stipulated that less than 50% of the dealer's contracts were sold to Ford Credit (Stipulation No. 12, p.3 of the Opinion in Appendix B), and that the dealer sold its contracts as well to seven other lenders. The Fifth Circuit's statement to the contrary in its opinion is without support in the record.

accordance with the terms of the assignment set forth on the reverse side hereof."

The buyers thereafter each filed separate actions against the dealers and Ford Credit alleging violations of the Act and the Regulation. In all nine actions, the buyers alleged that Ford Credit was an original creditor in the sale transactions and not a subsequent assignee. Upon this basis, the buyers claimed that Ford Credit was not adequately identified as an original creditor and is liable for all disclosure violations, including violations that were not apparent on the face of the assigned contracts. In the *Cenance*, *Strzelecki* and *Booker* cases, the buyers also claimed that tag, title and registration fees applicable to the purchase of the automobile should have been separately disclosed under the Act and the Regulation. In *Cenance*, the buyer argued that a $1.00 charge for lien recordation, which was disclosed by the dealer as a tag, title and registration fee, should instead have been disclosed as a fee paid to public officials. In the *Shropshire* and *Wiggs* cases, the buyers claimed that the dealer's inclusion of certain documentary fees as part of the cash price disclosure was a violation of the Act.

With the exception of the *Antonio* case, judgments were rendered by the District Courts in favor of the buyers on all claimed violations of the Act and the Regulation.

The Fifth Circuit:

(1) Affirmed the judgments in all cases insofar as the courts held that Ford Credit was an original creditor under the Act and the Regulation and was not adequately identified as an original creditor in the disclosure statements;

(2) Affirmed the judgments in all cases insofar as the courts held that Ford Credit, as an original creditor, is liable for all disclosure violations and may not claim the protection afforded to subsequent assignees by Section 131 of the Act;

(3) Reversed the judgments against Ford Credit in the *Cenance*, *Strzelecki*, and *Booker* cases insofar as the courts held that tag, title and registration fees must be separately disclosed;

(4) Affirmed the judgment against Ford Credit in the *Cenance* case insofar as the court held that the $1.00 lien recordation fee should have been disclosed as a fee paid to public officials;

(5) Affirmed the judgments against Ford Credit in the *Shropshire* and *Wiggs* cases insofar as the courts held that documentary fees should not have been included as part of the cash price disclosure; and

(6) Affirmed the judgment against Ford Credit in the *Shropshire* and *Wiggs* cases insofar as the courts rejected Ford Credit's argument that Section 226.6(d) of the Regulation relieved it of any duty to make disclosures as a multiple creditor.

REASONS FOR GRANTING THE WRIT.

This Petition will show that the decision of the Fifth Circuit: (1) Is in direct conflict with decisions of the Sixth, Seventh and Ninth Circuits and with an Official Staff Interpretation of the Federal Reserve Board on the question of creditor identification: (2) Is in direct conflict with a decision of the Third Circuit on the question of multiple creditor disclosure obligations; (3) Is in direct conflict with the disclosure principles recently established by this Court in *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980); (4) Is in direct conflict with the intent of Congress in defining the status of purchasers of consumer credit contracts in installment sales financing transactions; and (5) Renders uncertain the disclosure requirements applicable to installment sales financing transactions and throws open to attack millions of Truth in Lending disclosure forms.

I.

INTRODUCTORY STATEMENT.

These consolidated cases involve typical automobile installment sales financing transactions in which automobiles were sold to buyers on an installment basis by dealers who assigned the installment contracts to a financial institution. In holding that Ford Credit was an original creditor and not a subsequent assignee, the Fifth Circuit has obfuscated the distinction, recognized and provided for throughout the Act and the Regulation, between installment sales financing and direct lending. The structural differences between installment sales financing and direct lending have existed for over fifty years and have led to the development of an entire body of law distinguishing the two types of financing. These differences have also produced two distinct and separately regulated segments of the finance industry. The Fifth Circuit's failure to recognize these legal and his-

torical distinctions for Truth in Lending Act purposes leaves the sales finance industry gravely exposed as to millions of existing transactions and in doubt as to the disclosure obligations that will apply in future transactions.

A. Brief History of the Installment Sales Financing Industry.

With the advent of mass production techniques in the automobile industry, installment sales financing gained popularity during the 1920's as the only affordable means by which most consumers could purchase automobiles.[2] This type of financing soon gained acceptance and popularity in other areas as well, in large part because direct loan consumer financing was too costly to be extended within the limits of local usury laws that did not apply to installment sales transactions.[3] Installment sales financing has since played a dominant role in every field of consumer merchandising.

The success of the sales finance industry is exemplified by the fact that the form of installment sales financing has remained virtually unchanged over the past fifty years.[4] Then, as now, sales finance companies supplied forms, rate charts and credit guidelines to dealers in an effort to encourage business and insure that the installment obligations were in compliance with applicable laws. Throughout the

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[2]*See* 1 E. Seligman, The Economics of Installment Selling 42, 48-49 (1927).

[3]See Malcolm, The New Maximum Charges, in The Realities of Maximum Ceilings on Interest and Finance Charges 23, 24 (Conference on Personal Finance Law 1969); Warren, Regulation of Finance Charges in Retail Installment Sales, 68 Yale L.J. 839, 850 (1959).

[4]*See generally*, Warren, *supra* note 3, at 847; Britton & Ulrich, The Illinois Retail Installment Sales Act - Historical Background and Comparative Legislation, 54 NW. U.L. Rev. 137, 142 (1958); 1 Seligman, *supra* note 2, at 68-69; W. Plummer & R. Young, Sales Finance Companies and Their Credit Practices 106-07, 138-40, 197-204 (1940).

development of the installment sales financing industry, financial institutions have maintained close and continuing business relationships with their dealers. The transactions involved in these cases are virtually identical in all respects to the sales finance practices of the 1920's as well as those followed in the massive sales finance industry that developed over the next fifty years.

Over the years, installment sales financing has grown to become a vital part of our economic and social prosperity. By year end 1979, an estimated $90 billion of consumer credit had been extended through the use of this method of financing.[5] The availability of installment financing has permitted our country to rise to an unparalleled standard of living, and has been a continuing force in expanding the availability of credit to consumers and businesses alike.

B. Legal Distinction Between Installment Sales Financing and Direct Lending Under the Truth in Lending Act.

The structural differences between direct lending and installment sales financing has resulted in two segments of the consumer finance industry, each regulated by separate and distinct laws.[6] This distinction is recognized throughout the Act and the Regulation. For example, the Act and the

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[5]While no exact statistical breakdown between direct lending and installment sales financing is available, the *Federal Reserve Board Bulletin*, October 1980, page A 40, breaks down the $311.1 billion in consumer credit outstanding as of December 31, 1979 by type of credit and type of financial institution involved. From this analysis, it can be conservatively estimated that over 30 percent of all consumer credit was extended in installment sales financing transactions. *See also, Finance Facts Yearbook 1980*, pages 43-48, Library of Congress, Catalog Card Number 61-14409.

[6]For example, in most states installment sales transactions are not subject to state usury laws and are regulated by retail installment sales acts. Direct loan transactions, on the other hand, may be subject to state usury laws or consumer loan laws.

Regulation provide for different disclosures in the case of direct loans from those disclosures required in the case of sales transactions.[7]

The Board, in implementing the Act, acknowledged that in sales finance transactions, the ultimate holder of the contract will likely be a financial institution, such as a bank or finance company, that did not negotiate the credit terms or complete the credit documents. For this reason, the Board provided that the seller, not the financial institution, must make the disclosures required by the Act. Regulation Z, § 226.6(d). Congress also recognized the inherent limitations upon the ability of the financial institution, as an assignee of the contract, to control the disclosures that are made by the seller and provided that such financial institutions will not be responsible for errors made by the seller in preparing Truth in Lending disclosures unless those errors are apparent on the face of the disclosure statement. 15 U.S.C. §§ 1614, 1641.

C. The Conflict and Confusion Resulting From the Fifth Circuit's Decision.

Despite these clear provisions of the Act and the Regulation, the Fifth Circuit recharacterized the transactions and the relationships of the parties in these cases and held that Ford Credit was not an assignee of the contracts, but was an original extender of credit. The Fifth Circuit narrowly construed the subsequent assignee provisions of the Act so as to preclude their application to the massive installment sales financing industry. Ford Credit and other financial institutions will thus be denied the protection afforded by the Act to subsequent assignees for violations

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[7] *Compare*, 15 U.S.C. § 1638, 12 C.F.R. § 226.8(a) (credit sale disclosures) *with* 15 U.S.C. § 1639, 12 C.F.R. § 226.8(d) (credit loan disclosures).

of the Act and the Regulation that are not apparent on the face of the disclosure statement.

The Fifth Circuit's decision is in direct conflict with decisions of the Sixth, Seventh and Ninth Circuits and with an Official Staff Interpretation of the Federal Reserve Board on the creditor identification issue. The decision also conflicts with a decision of the Third Circuit on the disclosure obligations of multiple creditors in installment sales financing.

This conflict in the Circuits and the confusion and uncertainty that it has spawned, affects virtually the entire sales finance industry in the United States. Many financial institutions that purchase installment contracts operate on a national basis and, like Ford Credit, prepare disclosure statements that make uniform disclosures that can be used in all jurisdictions. This uniformity benefits both the credit industry, since the same form can be used throughout the country, and consumers, since uniform disclosures permit consumers to comparison shop for credit.

Despite this urgent need for disclosure uniformity, the same disclosure form that has been approved by the Sixth, Seventh and Ninth Circuits may not be used in the Fifth Circuit. And, the multiple creditor disclosure obligations that apply to financial institutions in the Third Circuit conflict with the disclosure obligations imposed upon such institutions in the Fifth, Tenth and District of Columbia Circuits. This Court should grant this Petition to resolve these conflicts.

II.

THE DECISION OF THE FIFTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF THREE OTHER CIRCUITS AND WITH AN OFFICIAL STAFF INTERPRETATION OF THE FEDERAL RESERVE BOARD ON THE CREDITOR IDENTIFICATION ISSUE.

A. The Decision of the Fifth Circuit Conflicts With Decisions of the Sixth, Seventh and Ninth Circuits and With an Official Staff Interpretation of the Federal Reserve Board on the Creditor Identification Issue.

The decision of the Fifth Circuit in these cases conflicts with decisions of the Sixth, Seventh and Ninth Circuits which have held that, even assuming that Ford Credit is a creditor for purposes of the Act and Regulation, it was adequately identified in the disclosure statement for Truth in Lending purposes. *Augusta v. Marshall Motor Co.*, 614 F.2d 1085 (6th Cir. 1979); *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423 (7th Cir. 1980); *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978), *rev'd on other grounds, Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980). The language in the disclosure statement that these Circuits found was sufficient to identify Ford Credit in the transaction is identical to the language appearing in the disclosure statement used in these cases as quoted at pages 3-4, *supra*.

In reaching its decision, the Fifth Circuit acknowledged the conflict with the decisions of the three other Circuits:

> "This particular issue is of first impression in this circuit. The Sixth, Seventh and Ninth Circuits have, however, uniformly held that conspicuous identification of a party in Ford's position as assignee adequately describes the relationship of the parties. (Citing cases.) All, however, expressly declined to decide whether

Ford was actually a creditor.'' 621 F.2d at n.2.

The Fifth Circuit based its decision upon the fact that, although the disclosure statement identified Ford Credit, it did not use the terminology ''creditor.'' In this respect, the Fifth Circuit's decision conflicts directly with an Official Staff Interpretation issued by the Federal Reserve Board which has concluded that ''[a]lthough the identification of a creditor is a required disclosure under § 226.8(a), this disclosure does not constitute required 'terminology.' '' Federal Reserve Board Official Staff Interpretation No. FC-0001, 41 Fed. Reg. 41907 (1976).

B. The Sixth, Seventh and Ninth Circuits Have Correctly Decided the Creditor Identification Issue.

The identity of the creditor is not required to be disclosed by the Act. The Regulation, however, requires that the creditor be identified on the disclosure statement furnished to the consumer. Regulation Z, §§ 226.8(a), 226.6(d). This disclosure statement must be delivered to the consumer at or before the consummation of the transaction, Regulation Z, § 226.8(a), which is defined in the Regulation as being ''the time a contractual relationship is created.'' Regulation Z, § 226.2(kk).

When the contracts in these cases were consummated, the only parties to the contracts were the selling dealers and the buyers. Even assuming that Ford Credit became a creditor after it accepted the assignment of the contracts, it was not a creditor at the time the credit transactions were consummated. Although Ford Credit had been asked by the dealers to pre-approve the buyer's credit, Ford Credit did not commit in advance to purchase the contracts and the dealers did not commit in advance to sell them to Ford Credit. In installment sales financing, a seller will frequently

ask a financial institution to pre-approve the buyer's credit and with this approval it will shop the contract among several financial institutions. The records in these cases indicate that the dealers sold their installment contracts to several financial institutions. In fact, in the *Antonio* case, the parties stipulated that less than 50% of the dealer's contracts were sold to Ford Credit.[8]

Even assuming that Ford Credit's identity was required to be disclosed, the Regulation does not require the use of any particular terminology in the disclosure, and Ford Credit was clearly identified on the disclosure forms as the intended assignee of the contracts. It was upon this basis that the Sixth, Seventh and Ninth Circuits properly held that Ford Credit's prospective relationship to the transaction was adequately described by the contract language adjacent to the buyer's signature. As stated by the Ninth Circuit in *Milhollin v. Ford Motor Credit Company*, 588 F.2d 753, 757 (9th Cir. 1978), *rev'd on other grounds, Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980):

> "Nowhere does Regulation Z require use of the word 'creditor.' Here, the exact role that Ford Credit ultimately played in each transaction was clearly disclosed. Requiring Ford Credit to use the word 'creditor' would not have given Consumers additional information nor better served the purposes of the Act."

In *Sharp v. Ford Motor Credit Company*, 615 F.2d 423, 426 (7th Cir. 1980), the Seventh Circuit held that Ford Credit had been adequately identified and stated:

> "[N]either the statute nor the regulations require that a creditor's identity be disclosed in a particular manner or be denominated by the specific and descriptive appellation of creditor. Indeed, the Federal Reserve

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[8]*See* note 1, *supra*.

> Board has stated in response to a similar claim: 'Although the identification of a creditor is required disclosure under § 226.8(a), this disclosure does not constitute required "terminology." ' Official Interpretation of Regulation Z, 41 Fed. Reg. 41908 (1976)."

The Sixth, Seventh and Ninth Circuits in ruling in favor of Ford Credit were concerned that, to require Ford Credit to be identified in some manner other than as the intended assignee, would not provide the buyers with any additional credit information that could assist them in shopping for credit by comparing credit terms.[9]

The Fifth Circuit's conflicting decision is not mandated by the Act or the Regulation and it does not further their credit shopping objectives. Compliance with the decision, however, will result in needless consumer confusion as to Ford Credit's exact status in such transactions and will leave to the buyer the responsibility to sort out the relationship of the parties. This will distract the buyer's attention from the important credit cost disclosures in the disclosure statement, thus defeating the purpose for which the Act was passed.

III.

THE DECISIONS OF THE THIRD, FIFTH, TENTH AND DISTRICT OF COLUMBIA CIRCUITS ARE IN CONFLICT WITH RESPECT TO THE DISCLOSURE OBLIGATIONS OF MULTIPLE CREDITORS UNDER REGULATION Z.

Ford Credit contends that it should be treated as a subsequent assignee of the consumer credit contracts and not

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[9]As stated by the Seventh Circuit in Sharp v. Ford Motor Credit Co., 615 F.2d 423, 426 (7th Cir. 1980):

> "To require, as appellants now contend, that Ford and General should have been designated as other than assignees on the installment contracts would not further the purpose of the Act but would, in our view, result in subverting the substance of the Act to form."

See also, Milhollin v. Ford Motor Credit Co., 588 F.2d 753, 757 (9th Cir. 1978), *rev'd on other grounds*, 444 U.S. 555 (1980).

as an original creditor for Truth in Lending purposes. However, even assuming that Ford Credit is viewed as an original creditor and the seller is viewed as an arranger of credit, the Fifth Circuit incorrectly applied the disclosure requirements of the Regulation. In doing so, its decision conflicts with the decision of the United States Court of Appeals for the Third Circuit in *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F.2d 102 (3d Cir. 1976).

Recognizing that under a variety of circumstances there may be more than one creditor in a consumer credit transaction, the Board attempted in Section 226.6(d) of the Regulation to delineate the respective disclosure responsibilities of multiple creditors. The first sentence of that Section provides that, where there are multiple creditors in a consumer credit transaction, each creditor is responsible for making only those disclosures "which are within his knowledge and the purview of his relationship with the customer." The third sentence of that same Section specifically provides that in a credit sale transaction the credit sale disclosures "shall be made by the seller if he extends or arranges for the extension of credit."

Applying the established rule of statutory construction that the specific language in a statute takes precedence over the general language, the Third Circuit in the *Manning* case held that in a credit sale transaction the responsibility to make credit sale disclosures is specifically and exclusively placed upon the seller:

> "In short, we hold that if the transaction is one in which the seller arranges credit, the obligation of disclosure is placed upon him by the third sentence of Regulation Z, § 226.6(d). In that factual situation the specific direction of the third sentence prevails over the general language limiting the scope of disclosure to items within the creditor's knowledge and the pur-

view of his relationship with the customer.'' 533 F.2d at 105.

The Tenth and District of Columbia Circuits, however, have reached the opposite conclusion. *Hinkle v. Rock Springs National Bank,* 538 F.2d 295 (10th Cir. 1976); *Price v. Franklin Investment Co., Inc.,* 574 F.2d 594 (D.C. Cir. 1977). The conflict in the Circuits was highlighted in the *Price* case:

> ''There has been a split among the Circuits as to the proper construction of this regulation. The Third Circuit, in *Manning v. Princeton Consumer Discount Co.,* 533 F.2d 102 (3d Cir.), *cert. denied,* 429 U.S. 865, 97 S.Ct. 173, 50 L.Ed.2nd 144 (1976), found that a transaction in which an automobile dealer arranged a loan for a customer with a finance company was in reality a 'credit sale,' and that both the dealer and the finance company were 'creditors' within the meaning of the Act and the Regulation. It held, however, that the duty of each to make the required disclosures, and the liability for failure to do so, was controlled by Section 226.6(d). It noted that the first sentence of that section would require 'each creditor' to make 'those disclosures . . . which were within his knowledge and the purview of his relationship with the customer,' but concluded that the more specific language of the third sentence controls whenever a 'seller . . . arranges credit.' By its terms, the *Manning* court held, the third sentence limits both the duty and the liability to the seller alone.
>
> Three other Courts have reached the opposite conclusion.'' 574 F.2d at 601.

The Fifth Circuit has now joined the Tenth and District of Columbia Circuits in rejecting the Third Circuit's multiple creditor analysis in *Manning*.[10]

Needless to say, in a multiple creditor situation it is just as important to know *who* must make the required disclosures as it is to know *what* disclosures must be made. The Board has attempted to delineate those responsibilities by setting forth a general rule that each creditor shall make those disclosures that are within its knowledge and the purview of its relationship with the customer. However, in the case of a credit sale transaction, the Board chose to be specific by providing that the seller must provide the credit sale disclosures. This reflects a recognition by the Board that in the typical credit sale transaction the seller has the exclusive knowledge of the specific terms of the credit sale and controls the disclosures that are made by completing the disclosure statement. Despite this fact, three out of the four Circuits that have considered this question have rejected the Board's specific disclosure rule and have imposed credit sale disclosure obligations upon financial institutions. This Court should grant this Petition and resolve this conflict.

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[10]In affirming the judgments against Ford Credit in the *Shropshire* and *Wiggs* cases, the Fifth Circuit dismissed Ford Credit's Section 226.6(d) defense with the observation that "[b]ecause this question is factual in essence and the district courts' findings are not clearly erroneous, we affirm." 621 F.2d at 135. The District Courts, however, made no findings that the disclosure errors alleged in the cases were within the purview of Ford Credit's relationship with the customers. In any event, the Fifth Circuit appears to have rejected the *Manning* court's legal conclusion that the third sentence of Section 226.6(d) places all credit sale disclosure obligations upon the seller in the multiple creditor situation regardless of the knowledge and relationship of the parties.

IV.

THE DECISION OF THE FIFTH CIRCUIT FAILS TO APPLY THE DISCLOSURE PRINCIPLES ESTABLISHED BY THIS COURT IN FORD MOTOR CREDIT COMPANY V. MILHOLLIN.

The stated purpose of the Truth in Lending Act is "to assure a meaningful disclosure of credit terms so that the customer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 102(a). Both Congress and the Board have recognized that this goal will be realized only if the disclosures required by the Act and the Regulation are kept simple, uniform and meaningful. This policy was recently confirmed by this Court in *Ford Motor Credit Company v. Milhollin,* 444 U.S. 555, 568 (1980):

> "The concept of 'meaningful disclosure' that animates TILA, . . . cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload].' " (Emphasis in original).

The Sixth, Seventh and Ninth Circuits applied this principle of limited and meaningful disclosure in holding that Ford Credit was adequately identified in the disclosure statements, even assuming that it was a "creditor" for purposes of the Act. All three Circuits held that the separate identification of Ford Credit as a creditor would not further the disclosure purposes of the Act and could complicate the disclosure statement and confuse consumers.

Ignoring this solid precedent favoring limited disclosures, including a decision of this Court less than one year old, the Fifth Circuit has opted for a more complicated disclosure rule. The Fifth Circuit's rule requires the disclosure state-

ment not only to identify the financial institution purchasing the contract but to do so with particular terminology even though the Regulation does not require such terminology and the Board has stated that such terminology is not necessary. This disclosure rule was in turn based upon the Fifth Circuit's recharacterization of installment sales financing transactions as direct extensions of credit by the financial institution despite the explicit provisions of the Act to the contrary. The Fifth Circuit's disclosure rule and the conflict in the Circuits discussed above have created widespread confusion as to how installment sales financing transactions should be disclosed. *See also* discussion *infra* at part VI. This will undoubtedly result in lengthier and more complicated disclosure statements as the credit industry seeks to provide disclosures that will satisfy all of the conflicting approaches.

V.

THE DECISION OF THE FIFTH CIRCUIT FRUSTRATES THE CLEAR PROVISIONS OF THE ACT AND THE REGULATION LIMITING THE LIABILITY OF PURCHASERS OF CONSUMER CREDIT CONTRACTS IN INSTALLMENT SALES FINANCING TRANSACTIONS.

A. The Fifth Circuit Decision Is in Conflict With the Provisions of the Act Limiting the Liability of Assignees to Violations That Appear on the Face of the Disclosure Statement.

The alleged disclosure errors made by the selling dealers in the *Shropshire* and *Wiggs* cases were the inclusion of certain documentary fees as part of the cash price disclosure. The alleged disclosure error made by the selling dealer in the *Cenance* case was the inclusion of a $1.00 fee for lien notation as part of the tag, title and registration fee disclosure. These errors were not apparent on the face of the contracts when they were assigned to Ford Credit. Section

131 of the Act, 15 U.S.C. § 1641, limits the liability of assignees of consumer credit contracts to disclosure errors that are "apparent on the face of the statement." In denying Ford Credit the protection of Section 131, the Fifth Circuit has frustrated the clear intent of Congress.

Petitioner has set forth in Appendix D to this Petition an analysis of the legislative history of those provisions of the Act defining the liability of purchasers of consumer credit contracts. This legislative history demonstrates beyond any question that Congress intended that financial institutions purchasing contracts in installment sales financing transactions would only be liable for Truth in Lending violations that appear on the face of the disclosure statements.

When Congress passed the Act in 1967, effective July 1, 1969, it was well aware of the typical manner in which installment sales financing was conducted in the United States. In order to protect financial institutions from liability for unknown violations of the Act and to facilitate the free flow of commerce, Congress included Section 131 in the Act. 15 U.S.C. § 1641. That Section provides that, except as to certain real estate transactions,[11] the customer's written acknowledgment of receipt of disclosure "shall be conclusive proof of the delivery thereof, and, unless the violation is apparent on the face of the statement, of compliance with this Chapter." The Report of the Senate Committee on Banking and Currency concerning this Section makes it clear that it was intended to protect financial institutions in the installment sales financing industry. The Report explained that the Section was:

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[11]Section 130(d) of the Act, 15 U.S.C. § 1640, specifically creates liability upon assignees in real estate transactions who are in a continuous business relationship with the original creditor.

> "designed to facilitate the free flow of credit paper. It provides a bank or finance company with assurance that the original dealer has made the required disclosure *and that the bank or finance company will not be liable for any failure, on the dealer's part, to make disclosure.*" "Explanation of Changes in Committee Print," 113 Cong. Rec. 14694, 14695 (June 5, 1967) (emphasis added). App. D at 95.

In adopting Section 131, Congress specifically rejected an earlier draft of the Section that would have provided that the Section does not apply if "the assignee, its subsidiaries, or affiliates, are in a continuing business relationship with the original creditor." App. D at 96-99.

This legislative history clearly demonstrates that Congress intended financial institutions participating in the sales finance industry to be treated as subsequent assignees under Section 131 and to be entitled to the protection afforded by that Section even where they were engaged in a continuing business relationship with the seller.

In 1974, Congress passed Section 115 of the Act. 15 U.S.C. § 1614. That Section provides that any civil action which may be brought against the original creditor in any transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the liability arose is apparent on the face of the instrument assigned. This Section was passed based upon the recommendations of the National Commission on Consumer Finance. The Commission concluded that, in the typical installment sales financing transaction, the financial institution prepares blank forms of contracts and disclosure statements, has the capacity to audit the forms for compliance with the Act, engages in multiple purchases from the same dealer and is otherwise closely connected with the dealer. The Commission felt that, because of this close contact

between the financial institution and the dealer, it would be fair to impose liability upon the financial institution for violations that appear on the face of the disclosure statement. App. D at 100-102.

The Commission's recommendations and the action of the Congress in passing Section 115, make it even more clear that Congress was aware of the practices that prevailed in the massive sales finance industry and once again chose to treat financial institutions as subsequent assignees with their liability limited to violations that are apparent on the face of the disclosure statement. Had such financial institutions been considered by Congress to be original creditors and not subsequent assignees, it would not have been necessary for Congress to enact Section 115 since such financial institutions would have been liable as creditors for all violations whether or not they were apparent on the face of the disclosure statement.[12]

B. The Truth in Lending Simplification and Reform Act Repudiates the Fifth Circuit's Holding That the Purchaser of a Consumer Credit Contract in an Installment Sales Financing Transaction Is an Original Creditor Under the Act.

On March 31, 1980, President Carter signed the Depository Institutions Deregulation and Monetary Control Act of 1980. Public Law No. 96-221, 94 Stat. 132. Title VI of that Act enacted the Truth in Lending Simplification and

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[12]Significantly, as part of the same legislation that adopted Section 115 (Pub. L. No. 93-495), Congress enacted Section 702(e) of the Equal Credit Opportunity Act (15 U.S.C. § 1691a(e)), which defined "creditor" for the purpose of that Act as including "any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." Although the definition of "creditor" in the Truth in Lending Act was also amended at the same time, Congress did not include "assignees" within that definition. App. D at 103.

Reform Act (herein "Simplification Act"). Upon the recommendation of the Board, Congress in the Simplification Act amended the definition of creditor to explicitly reject the Fifth Circuit's holding in *Meyers v. Clearview Dodge*, 539 F.2d 511 (5th Cir. 1976) relied upon by the Fifth Circuit in these cases in ruling against Ford Credit. In holding that purchasers of consumer credit contracts in installment sales financing transactions are creditors under the Act, the *Meyers* court rejected as an argument which "elevates form over substance" the position that the seller to whom the contract is payable is the original creditor. Congress has now made it clear that it intends the form of the transaction to govern by providing that the creditor "is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness." Simplification Act § 602(a)(1). App. D at 104-109.

This latest expression of Congressional intent concerning the creditor issue completes a long chain of legislative history in which Congress has repeatedly expressed its intention that financial institutions in installment sales financing transactions should not be treated as original creditors under the Act. This new provision of the Simplification Act clarifying the status of such assignees should be considered declaratory of the existing law since it is consistent with that law and is over whelmingly supported by the legislative history of the law. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980); *Regents of University of California v. Bakke*, 438 U.S. 265, 349 (1978) (opinion of Justices Brennan, White, Marshall and Blackmun); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

Although the Simplification Act will resolve many of the uncertainties that exist in applying the Act and the Regulation to installment sales financing transactions, the Act does not become effective until April 1, 1982. It will thus

not protect sellers and financial institutions from claims based upon the millions of disclosure statements that have been used in existing transactions. And, until the Act becomes effective, the conflict in the Circuits and the confusion resulting from this conflict will undoubtedly worsen, thereby increasing the exposure of sellers and financial institutions with each passing day.

VI.

THE FIFTH CIRCUIT DECISION RENDERS UNCERTAIN THE DISCLOSURE REQUIREMENTS APPLICABLE TO INSTALLMENT SALES FINANCING AND THROWS OPEN TO SERIOUS QUESTION MILLIONS OF CONSUMER CREDIT DISCLOSURE STATEMENTS.

The Fifth Circuit decision in these cases creates many uncertainties as to how installment sales financing transactions should be disclosed. In holding that an assignee of a consumer credit contract is an original extender of credit, the Fifth Circuit's decision leaves open the question of whether the assignee should make loan or sale disclosures under the Act and the Regulation. If characterized as the direct extender of credit to the consumer, the financial institution could be viewed as a direct lender to the buyer. Viewed in this manner, the financial institution would be obligated to make Truth in Lending loan disclosures. *See* Miller, *Truth in Lending Act,* 34 Bus. Law. 1405, 1418 (1979).[13] However, in making these loan disclosures, the financial institution would expose itself to substantial claims

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[13]On this issue there is also a conflict in the Circuits. The Fifth Circuit holds that, where the dealer and the financial institution are both creditors, they are jointly obligated to make Truth in Lending *sale* disclosures. *See* Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976). In Joseph v. Norman's Health Club, Inc., 532 F.2d 86 (8th Cir. 1976), however, the Eighth Circuit held that, in this situation, the financial institution must make Truth in Lending *loan* disclosures. *Accord,* Glaire v. La Lanne-Paris Health Spa, Inc., 12 Cal. 3d 915, 117 Cal. Rptr. 541, 528 P.2d 357 (1974).

under state loan laws regulating interest rates and lender practices.

The Fifth Circuit's recharacterization of installment sales financing transactions coupled with its apparent rejection of the Third Circuit's decision in *Manning* may also lead to dual disclosure obligations, with the seller required to make sale disclosures and the financial institution required to make loan disclosures all in the same transaction. This would needlessly complicate the disclosure statement and lead to consumer confusion which would defeat the purposes of the Act.

Even if the assignee is not viewed as an extender of loan credit, the Fifth Circuit's decision will inevitably create disclosure confusion. When the consumer credit contract is signed and the disclosure statement is furnished to the buyer, the financial institution with whom the seller does business is not a party to the contract and may never purchase the contract. It would thus be misleading for the seller to identify the financial institution as a creditor when the disclosures are provided to the buyer.[14] Financial institutions purchasing contracts from sellers will face an equally serious dilemma because of their potential liability as creditors for violations of the Act and Regulation that are not apparent on the face of the contracts that they purchase. In order to uncover such latent violations, these financial institutions would be required to conduct a factual audit of every con-

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[14]In Clausell v. Abraham Lincoln-Mercury, Inc., Civ. Action No. 79-1139 (E.D. La., July 22, 1980) the dealer sold a Ford Credit form of conditional sale contract to another financial institution. The Court held that "the naming of Ford Motor Credit Company as an assignee on the disclosure form was misleading and confusing and therefore in violation of Regulation Z, 12 C.F.R. 226.6(c)." A copy of the Court's opinion is reprinted in Appendix E.

tract that they purchase which would impede the free flow of commerce.

The Fifth Circuit's decision in these cases exposes the entire sales finance industry to civil liability through class action claims of truly staggering proportions. Few, if any, financial institutions in the sales finance industry are identified in disclosure statements in the manner required by the Fifth Circuit. This violation alone will subject these financial institutions to the severe penalties provided for in the Act in an estimated $90 billion of installment sales financing transactions. It will also subject these financial institutions to liability for hidden disclosure errors as small as the $1.00 filing fee error alleged in the *Cenance* case.

Conclusion.

The decision of the Court below represents a radical and unprecedented departure from prior judicial decisions interpreting the clear disclosure requirements of the Act and the Regulation. This Court should intervene in order to eliminate the conflict in the Circuits and promote uniformity of decision as to the disclosure obligations of sellers and financial institutions in installment sales financing transactions.

Respectfully submitted,

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APPENDIX A.

Janet Cenance, Plaintiff-Appellee, v. Bohn Ford, Inc., Defendant-Appellant, Ford Motor Credit Company, Defendant-Appellant.

Nicole Antonio, Plaintiff-Appellant, v. Canal Motors, Inc., Defendant, Ford Motor Credit Company, Defendant-Appellee.

Marion Shropshire, Plaintiff-Appellee, v. George Thompson Ford, Inc., Defendant-Appellee, v. Ford Motor Credit Corporation, Defendant-Appellant.

Solomon Wiggs, Plaintiff-Appellee, v. Ford Motor Credit Corporation, Defendant-Appellant.

Jimmy W. Farrell, Plaintiff-Appellee, Cross-Appellant, v. Frank Jackson Motors, Inc., d/b/a Jackson AMC-Jeep, Defendant-Appellant, Cross-Appellee.

Randolph Booker, Jr., Plaintiff-Appellee, Cross-Appellant, v. Ford Motor Credit Company, Defendant-Appellant, Cross-Appellee.

Nicholas Strzelecki, Plaintiff-Appellee, v. Terry Ford Company and Ford Motor Credit Company, Defendants-Appellants.

Michael Duane Culver, Plaintiff-Appellee, v. Greenbriar Lincoln Mercury Sales, Inc. and Ford Motor Credit Company, Defendants, Ford Motor Credit Company, Defendant-Appellant.

Dennis Vissichelli, Plaintiff-Appellee, v. Terry Ford Company and Ford Motor Credit Company, Defendants-Appellants.

Thomas J. Rogers and Phyllis Rogers, Plaintiffs-Appellees, v. Frank Jackson Lincoln-Mercury and Ford Motor Credit Company, Defendants-Appellants.

Nos. 77-2200, 77-3508, 78-2369, 78-2914, 79-1139, 79-1584, 79-2227, 79-2340, 79-2449 and 79-2672.

United States Court of Appeals, Fifth Circuit.
July 9, 1980.

Purchasers of automobiles brought actions against automobile dealers and finance company to recover for alleged violations of the Truth in Lending Act. The United States District Court for the Eastern District of Louisiana, 430 F.Supp. 1064, and the United States District Court for the Northern District of Georgia, 458 F.Supp. 1387, entered judgments for plaintiffs, and appeals were consolidated with other Truth in Lending Act suits. The Court of Appeals, Kravitch, Circuit Judge, held that:

(1) finance company which routinely financed the sale of automobiles by dealers in exchange for assignment of original note from purchaser was a "creditor" within meaning of the Truth in Lending Act, since dealer and finance company prearranged for the assignment of finance instrument, the risk of finance did not reside with dealer, and transaction between dealer and purchaser was conditioned upon acceptance of credit application by finance company, and

(2) finance company was not sufficiently identified as a creditor in Truth in Lending statement which designated finance company as a "subsequent assignee."

Affirmed in part, reversed in part and remanded in part.

Appeals from the United States District Court for the Eastern District of Louisiana.

Appeals from the United States District Court for the Northern District of Georgia.

Before COLEMAN, Chief Judge, PECK,* and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge.

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*Circuit Judge of the Sixth Circuit, sitting by designation.

The common issues binding these consolidated cases are whether a finance company, Ford Motor Credit Co. [Ford], which routinely finances the sale of automobiles by dealers in exchange for assignment of the original note from the purchaser (1) is a creditor within the meaning of the Truth-in-Lending Act, and (2) whether designation of Ford as "subsequent assignee" adequately describes its relationship with the consumer debtor. We answer the first question "yes," the second "no."

All plaintiffs involved purchased automobiles on credit from various party automobile dealers. Each of the dealers had a similar standing agreement with Ford: as a prerequisite for the extension of credit, purchasers were required to submit a credit application to Ford on a form printed by Ford. If the application met with Ford's approval, Ford would purchase the credit instrument after execution by the dealer and purchasers without further participation or risk on the part of the dealer.

The Truth-in-Lending statement did not disclose Ford as a creditor but rather referred to Ford as a "subsequent assignee." The final portion of the statement provided:

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of assignment set forth on the reverse side thereof.

In all cases the district courts held that Ford was a creditor under the Truth-in-Lending Act and that such status had not been adequately disclosed in the Truth-in-Lending statement.

A. *Ford's Status as Creditor*

The Truth-in-Lending Act, 15 U.S.C. § 1601 et seq., and Regulation Z thereunder define a creditor as one who, in the ordinary course of business, "regularly extends or

arranges for the extension of consumer credit or offers to extend or arrange for the extension of such credit . . .'' Reg. Z, 226.2(s), 12 C.F.R. § 226.2(s) (1976).

In *Meyers v. Clearview Dodge*, 539 F.2d 511 (5th Cir. 1976), this Court was first confronted by the question whether a downstream finance company was a creditor or subsequent assignee within the above provision of Regulation Z. In *Meyers*, the automobile dealer prearranged credit with one of several institutions, unlike the instant cases in which a standing agreement with only a single finance company existed. Holding that the dealer was the *arranger* of credit but that the finance company, Chrysler Credit, was the *extender* of credit, the court stated:

> Chrysler Credit argues . . . that it is merely a ''subsequent assignee'' within the meaning of that term in section 1641 of the Act. Appellant insists that Clearview is the original creditor in this transaction, since at the moment the transaction was consummated Clearview was the holder of the note and chattel mortgage, and consequently the only one to whom appellee was obligated. However, appellant's argument elevates form over substance in an effort to avoid the realities of the credit transaction. Clearview never assumed any of the risks normally associated with the extension of credit in its dealings with appellee. By prearranging the assignment of the installment contract to Chrysler Credit, or any other institutional lender, Clearview merely arranged to sell the automobile for cash to be supplied by another. There is little doubt that in this transaction ''credit,'' ''the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment,'' was extended by Chrysler Credit and arranged for by Clearview.

539 F.2d at 515, 516.

The *Meyers* analysis applies with even greater force to the instant situation because here the dealers regularly dealt only with Ford. The dealer and Ford prearranged for the assignment of the finance instrument. At no time did the risk of finance reside with the dealer. The transaction between dealer and automobile purchaser was conditioned upon acceptance of the credit application by Ford. Indeed, the credit application form was prepared by Ford. As in *Meyers*, it would be elevating form over substance to hold that Ford was anything but an original creditor within the meaning of the Act and Regulation Z.

In order to avoid the *Meyers* doctrine, the appellants contend that a recent provision passed in 1974, 15 U.S.C. § 1614,[1] limiting the liability of assignees, clearly expresses a Congressional intent that entities in the position of Ford are not to be treated as creditors. Although the section does address the liability of subsequent assignees, the appellants' argument begs the question of whether Ford is truly a "subsequent assignee" in substance rather than form. Simply denominating oneself as a subsequent assignee is insufficient. To enjoy the protection of the new provision, the company must be subsequent assignee in fact as well as name. Thus, the status of a loan participant is determined by the nature of the participation rather than a designation arbitrarily shown on the loan instrument.

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[1]15 U.S.C. § 1614 reads:

> Except as otherwise specifically provided in this subchapter [15 U.S.C. §§ 1601, et seq.] any civil action for a violation of this subchapter [15 U.S.C. §§ 1601, et seq.] which may be brought against the original creditor in any credit transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the alleged liability arose is apparent on the face of the instrument assigned unless the assignment is involuntary.

Ford next argues that even if it is deemed a creditor for Truth-in-Lending purposes, the relationship between it and the debtor consumer was adequately disclosed in the statement concerning subsequent assignment. This issue was not reached by the court in *Meyers* because there no disclosure of Chrysler's participation in the transaction had been made. Although other circuits have held to the contrary,[2] we do not accept Ford's argument. The Truth-in-Lending Act requirement of disclosure of *all* creditors is quite clear. Section 226.6(d) of Regulation Z provides in part:

> If there is more than one creditor . . . in a transaction, each *creditor* shall be *clearly* identified . . . (emphasis added)

Disclosure of Ford as subsequent assignee does not "clearly" identify it as a creditor. Additionally, Ford cannot be both a creditor and a subsequent assignee. *Meyers, supra,* 539 F.2d at 515.[3] Accordingly, because Ford is a creditor for Truth-in-Lending purposes and did not disclose that status

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[2]This particular issue is of first impression in this circuit. The Sixth, Seventh and Ninth Circuits have, however, uniformly held that conspicuous identification of a party in Ford's position as assignee *adequately* describes the relationship of the parties. *Augusta v. Marshall Motor Co.*, 614 F.2d 1085 (6th Cir. 1979); *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423 (7th Cir. 1980); *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978). All, however, expressly declined to decide whether Ford was actually a creditor.

[3]Although *Meyers* involved the interpretation of 15 U.S.C. § 1641 rather than § 1614, the analysis is equally persuasive. Section 1641 provides:

> Except as provided in section 1635(c) and except in the case of actions brought under section 1640(d), in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this subchapter shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this part. This section does not affect the rights of the obligor in any action against the original creditor.

except by reference to assignment, we hold that Ford violated § 226.6(d) of Regulation Z and affirm the district courts.

B. *Itemization of "Tag, Title and Registration Fees"*

There remain to be disposed of issues not common to all the consolidated cases. *Cenance, Strzelecki* and *Booker* all involve the question whether "tag, title and registration fees" must be itemized separately. This recently has been answered negatively by this court in *Downey v. Whaley Lamb Ford Sales, Inc.*, 607 F.2d 1093 (5th Cir. 1979). The district courts therefore are reversed on this issue.

Cenance also involves the question whether a $1.00 charge for lien or mortgage recordation was properly disclosed under the designation "license, title and registration fees." This issue is not one of improper itemization but rather misnomer. Because Regulation Z distinguishes the category embracing mortgage recordation fees from that of "license, tag and registration fees," the inclusion violated the Truth-in-Lending Act. Part b(1) of 12 C.F.R. § 226.4 is denominated "Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction." Section (b)(4) refers to: "License, certificate of title, and registration fees imposed by law." These separate definitions serve to differentiate charges paid to perfect mortgages from registration fees. This distinction is not without reason. A charge for "tag, title and registration fees" is independent of the nature of the transaction, whether cash or credit. A lien recordation fee, in contrast, will only occur in a credit transaction. Separate designation of these types of charges in the regulations compels the conclusion that fees paid to officials for the purpose of perfecting a security interest simply is

not a "title, tag or registration" fee. Inclusion of the lien recordation fee under that heading therefore violated the Act. The district court, therefore, is affirmed.

C. *Responsibility of a Joint Creditor*

Finally, in *Shropshire* and *Wiggs*, Ford argues that if it should be considered a creditor it is only liable for those violations which were within its purview. The particular violations are not at issue on appeal. Ford relies on 12 C.F.R. § 226.6(d)[4] which limits liability of joint creditors to those items within its knowledge and scope of relationship with the consumer. Because this question is factual in essence and the district court's findings are not clearly erroneous, we affirm.

We have considered the remaining points raised on appeal but find them without merit.[5]

AFFIRMED IN PART, REVERSED IN PART AND REMANDED IN PART.

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[4]Section 226.6(d) of Regulation Z provides as follows:

> (d) *Multiple creditors or lessors; joint disclosure.* If there is more than one creditor or lessor in a transaction, each creditor or lessor shall be clearly identified and shall be responsible for making *only those disclosures required by this part which are within his knowledge and the purview of his relationship to the customer* or the lessee. If two or more creditors or lessors make a joint disclosure, each creditor or lessor shall be clearly identified. The disclosures required under paragraphs (b) and (c) of § 226.8 shall be made by the seller if he extends or arranges for the extension of credit. Otherwise disclosures shall be made as required under paragraphs (b) and (d) of § 226.8 or paragraph (b) of § 226.15. (Emphasis supplied)

[5]In *Booker*, Ford argues that summary judgment was improper because a genuine dispute as to a material fact existed. We agree and remand. We observe, however, that the court was correct in holding that the plaintiff had received a duplicate instrument as required by Regulation Z § 226.8(a). In *Culver*, Ford contends that it was entitled to a partial setoff based upon a settlement agreement between the dealer and the purchaser. The legal effect of the settlement was not raised below, however.

Judgment.

United States Court of Appeals For the Fifth Circuit.

No. 77-2200. D. C. Docket No. CA-76-2878-C.

Janet Cenance, Plaintiff-Appellee, versus Bohn Ford, Inc., Defendant-Appellant, Ford Motor Credit Company, Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before COLEMAN, Chief Judge, PECK* and KRAVITCH, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 9, 1980.

A true copy
Test GILBERT F. GANUCHEAU Clerk,
U.S. Court of Appeals, Fifth Circuit
By Claudia Nides, Deputy
New Orleans, Louisiana

DATE OF ENTRY OCT 31, 1980.
ISSUED AS MANDATE: OCT 30 1980.

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*Hon. John W. Peck, Circuit Judge of the Sixth Circuit, sitting by designation.

APPENDIX B.

United States District Court, Eastern District of Louisiana.

Janet Cenance, Plaintiff versus Bohn Ford, Inc. and Ford Motor Credit Company, Defendants.

Civil Action No. 76-2878.

Filed: Apr. 14, 1977.

Joseph W. Thomas, Esq., Attorney for Plaintiff; Peter A. Feringa, Jr., Esq., Norris Williams, Esq., Attorneys for Defendant; William J. Wegmann, Esq., Attorney for Defendant.

RUBIN, District Judge:

The plaintiff seeks damages for a claimed violation of the Truth in Lending Act as a result of failure properly to itemize the charges made and properly to identify the true lender on the required disclosure form. Although the amount of the charge that was not properly itemized is small, the statutory violation is clear. The true lender was not identified in a way that would be clear to the borrower. Hence, judgment is rendered for the plaintiff.

I

On 26 April 1976, plaintiff entered into a contract with Bohn Ford ("Bohn") to purchase a used 1974 Ford automobile. She did not pay cash, but sought credit. To obtain this, she agreed to time payments pursuant to the terms of an automobile retail installment contract and filled out a credit application to Ford Motor Credit Co. ("Ford") on a form printed by Ford. Bohn had a standing arrangement with Ford to handle credit sales in this way, and, in addition to receiving payment for the automobiles it sold, was paid a consideration by Ford out of the net proceeds of the transactions accepted by Ford. Bohn and Ford both contemplated

throughout that, if the application was satisfactory, Ford would finance the car, and Bohn would not itself undertake the financing risk.

On the next business day, Bohn submitted plaintiff's application to Ford, and was advised that Ford would purchase the credit instrument represented by the Ford approved forms if Bohn and the plaintiff executed them. The plaintiff signed these documents, supplied by Ford, then the defendant's representative signed them and submitted them to Ford, which promptly remitted the agreed upon price to Bohn.

Bohn's business is selling automobiles. Ford's principal business is financing Ford dealers by making direct loans to them and by purchasing automobile retail installment contracts from them.

II

The plaintiff was required to pay a fee of $1.00, which was later actually paid to a public official for recording the chattel mortgage held as security for the credit sale. The disclosure form showed the following:

License, Title & Registration Fees $10.50.

The state's charge for the automobile license was $6.00, and the state's charge for the automobile title and registration was $3.50. The sum of $1.00 was actually paid for recording the mortgage, but this was not separately itemized and Bohn says it was included in the $10.50.

Section 226.4 of the Truth in Lending Regulations permits creditors to omit from the finance charge "fees and charges prescribed by law" if they are otherwise itemized and disclosed to the borrower.[1] Including the official fee for recording a mortgage in the charge shown for "License, Title

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[1]12 C.F.R. 226.4(b).

& Registration'' does not satisfy the requirements of the regulations. The *finance charge* is what the credit consumer is told is the cost of his credit. In order for the creditor to exclude *official charges* from the *finance charge*, the official charges must be itemized. A charge may not be lumped together with a number of other, ostensibly official, charges. Grant v. Imperial Motors, 5 Cir. 1976, 539 F.2d 506. The consumer has a right to know the nature of and amount of each charge exacted by law rather than by the creditor.

It is possible to indulge in semantic pilpul about whether a charge for recording a mortgage is embraced within the phrase ''license, title, and registration fees.'' But, however common parlance or dictionaries may treat the terms, Section 226.4 of the Regulations distinguishes the two types of charges for Truth in Lending purposes. 12 C.F.R. §226.4. Section (b)(1) refers to: ''Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.'' Section (b)(4) refers to: ''License, certificate of title, and registration fees imposed by law.'' These separate definitions serve to differentiate charges paid to perfect mortgage from registration fees. Hence, the disclosure statement fails to itemize the charge for recordation and is deficient. The Fifth Circuit has recently held that the modesty of an omitted charge is no defense. Grant v. Imperial Motors, supra, 539 F.2d at 510. Even if it were a defense, we do not deal here with a minor error but with a practice dictated by a printed form that is obviously used repetitively. Hence, it cannot be treated as inadvertent or de minimis.

III

Nor is there any itemization of the other charges included in the $10.50 exacted for ''license, title and registration fees.'' It was not sufficient for the defendants to list the

charges collectively; the borrower has a right to know not only the total sum of officially prescribed fees, but also the specific amount of each such fee. In Grant v. Imperial Motors, supra, the court held:

> The requirements of this section are clear; unless the fees imposed by law in this transaction are itemized, they must be included in the computation of the finance charge.

539 F.2d at 510. In *Grant,* the defendant had disclosed charges for license tag and title registration by aggregating the two and calling them "official fees". While the disclosure statement revealed the nature of the official fees, the components of the fees were not listed separately, as the court held the Truth in Lending Act requires.

IV

The Truth in Lending Act, through the regulations promulgated pursuant to it, requires that the creditor who makes a loan be clearly identified on the disclosure statement.[2] Ford was mentioned in only one way on the disclosure form; at the bottom of the form, there was the recital:

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[2] . . . At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made *and on which the creditor is identified* . . .

12 C.F.R. 226.8(a).

> If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer. If two or more creditors make a joint disclosure, each creditor shall be clearly identified. The disclosures required under paragraph (b) and (c) of §226.8 shall be made by the seller if he extends or arranges for the extension of credit. Otherwise disclosures shall be made as required under paragraph (b) and (d) of §226.8.

12 C.F.R. 226(d).

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the assignment set forth on the reverse side hereof.

This obviously refers to Ford only as a potential assignee, and the assignment was, of course, to be executed only at some time after the plaintiff signed the form.[3] The real question is whether Ford was a "creditor" as defined in the Regulations when the plaintiff executed the instrument so that it had to be identified.[4]

V

The Act and Regulation Z define a creditor as one who, in the ordinary course of buisness, "regularly extends or arranges for the extension of consumer credit or offers to extend or arrange for the extension of such credit. . ." Reg. Z, 226.2(s), 12 C.F.R. §226.2(s), (1976).

Ford was the ostensible assignee of the installment sales contract for the sale by Bohn to the plaintiff. But the form the transaction took, an apparent credit sale by Bohn, followed by an assignment to Ford, was planned by Ford for the putative advantages Ford would gain were it not a lender but an assignee. As indicated above, Bohn obtained credit information from the plaintiff on a form of customer statement prepared by Ford before entering into any agreement with the plaintiff. Based upon this data, Ford approved the plaintiff's credit standing and agreed to the transaction.

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[3]One district court has considered such a reference a sufficiently clear identification, Virginia Jones Main v. Faller Ford, Inc., C.A. 74-337, W.D. Pa., April 22, 1976.

[4]This determination is also significant in deciding the joint liability of Ford for the other violations of the Regulations. See this opinion, supra.

The terms of the proposed credit sale were incorporated in a blank form of contract prepared by and furnished to Bohn by Ford. Subsequent to the sale of the automobile, the contract was tendered to Ford. It was "purchased" by Ford in the ordinary course of a continuing business relationship between Ford and Bohn, under which Ford purchased a substantial quantity of such credit paper.

The facts pointing to Ford as lender—because Bohn dealt entirely with Ford unless the purchaser was able to make his own arrangements—are even stronger than those in Meyers v. Clearview Dodge, 5 Cir. 1976, 539 F.2d 511.

> It is undisputed that Clearview is in the business of selling automobiles and does not ordinarily finance credit sales itself. Instead, when the purchaser has not made financing arrangements of his own, Clearview takes a financial statement and submits it to several institutional creditors with whom it regularly deals for approval of the purchaser's credit. If any one of the lenders approves the customer's credit, Clearview completes the sale and immediately assigns the commercial papers to an approving lender. This practice of prearranging the assignment of commercial paper is a regular and essential part of Clearview's business and is, as the district court concluded, tantamount to arranging for the extension of credit.

539 F.2d at 515. There the Fifth Circuit held that the financer who agreed to take a particular loan was, in fact, an extender of credit, even though it might also be characterized as an assignee:

> Chrysler Credit argues . . . that additional undisputed facts support a conclusion that it is merely a 'subsequent assignee' within the meaning of that term in section 1641 of the Act. Appellant insists that Clearview is the original creditor in this transaction, since at the moment the transaction was consummated Clear-

> view was the holder of the note and chattel mortgage, and consequently the only one to whom appellee was obligated. However, appellant's argument elevates form over substance in an effort to avoid the realities of the credit transaction. Clearview never assumed any of the risks normally associated with the extension of credit in its dealings with appellee. By prearranging the assignment of the installment contract to Chrysler Credit, or any other institutional lender, Clearview merely arranged to sell the automobile for cash to be supplied by another. There is little doubt that in this transaction 'credit,' 'the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment,' was extended by Chrysler Credit and arranged for by Clearview.

539 F.2d at 515, 516.

Under *Meyers*, all who are assignees under state law are not treated alike when they handle transactions governed by the Truth in Lending Act. The issue is whether the assignee was so involved in the original decision to extend credit that it was not merely a firm who came on the scene after a lender had extended credit and purchased the loan, innocent of the original terms of the credit relationship and the disclosure statement, but, in fact, the intended creditor from the start.

The passage of a new provision limiting the liability of assignees in 1974, 15 U.S.C. §1614, does not alter that rule.[5] The new section, quoted in the footnote,[6] was de-

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[5]The *Meyers* case dealt with 15 U.S.C. §1641 rather than 15 U.S.C. §1614, but its reasoning is apposite here. See also 15 U.S.C. §1640(d).

[6]15 U.S.C. §1614 reads:

> Except as otherwise specifically provided in this title [15 U.S.C. §§1601, et seq.] any civil action for a violation of this title [15 U.S.C. §§1601, et seq.] which may be brought against the original creditor in any credit transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the alleged liability arose is apparent on the face of the instrument assigned unless the assignment is involuntary.

signed to immunize true assignees from liability for all violations except those apparent on the face of the instrument. Indeed, the section employs the term "*subsequent* assignee" (emphasis supplied) to differentiate assignees who participate in the initial decision to extend credit from those who are not involved in the credit transaction until after assignment. To interpret Section 1614 as applicable to all who are nominal assignees, as Ford suggests, would permit the real lender to extend credit from behind the scenes, though the ostensible lender is merely its puppet so far as the credit decision goes. The real lender could then issue a joint disclosure statement with the arranger of credit, yet claim the limited liability permitted by Section 1614 because of the timing of the assignment of the contract. Although one of my brethren thinks otherwise, (Williams v. Bill Watson Ford, C.A. 74-3379, E.D. La. 1976), I do not believe that this was the intent of the 1974 amendment.

Thus, while Ford may have been an assignee for state law purposes, it was a creditor as that term is defined in the Regulations, and violated Regs. 226.8(a) and 226.6(d) by failing clearly to identify itself on the disclosure statement.

VI

Ford contends that the identification requirement is unenforceable because the Federal Reserve Board ("FRB") exceeded its statutory authority[7] in promulgating Regs. 226.8(a)

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[7]The Board shall prescribe regulations to carry out the purposes of this title [15 USC §§1601 et seq.]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title [15 USC §§1601 et seq.], to prevent circumvention or evasion thereof, or to facilitate compliance therewith. 15 U.S.C. §1604.

The Act provides recovery by the successful individual plaintiff in the amount of $100.00 or twice the finance charge, but, in no case, more than $1,000.00. 15 U.S.C. §1640(a). The finance charge in this case was $934.61, so that the plaintiff may recover $1,000.00. That same section permits recovery of costs.

and 226.6(d). The parameters of the Board's authority are broad, and a regulation will be upheld whenever it is "reasonably related to the purposes of the enabling legislation." Mourning v. Family Publications Service, 1973, 411 U.S. 356, 93 S.Ct. 1652. The FRB was not unreasonable in concluding that knowledge of a creditor's identity promotes the "informed use of credit," the express goal of the Truth in Lending Act.

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit . . . It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

15 U.S.C. §1601.

Congress deemed that the FRB was capable of formulating the details of the regulatory plan. Congress delegated to FRB the authority to use its reasonable discretion in promoting the informed use of credit. This broad delegation of authority is not confined to regulations that dictate only disclosure of the terms of the contract—in other words, the cash price, the finance charge, etc. While the discretion of the FRB is not unbounded, the creditor's identity is not a frivolous or extraneous bit of information, and may be important in the borrower's decision to commit himself to a particular credit arrangement. Informed persons sometimes do not choose to borrow from a lender known to be difficult to deal with and exacting in its demands.

Because Ford is not merely a "subsequent assignee", it is jointly liable with Bohn for any violations of the Act or

Regulations contained in the disclosure statement. Meyers v. Clearview Dodge Sales, Inc., supra.

Section 1614 limits the liability of a subsequent assignee to instances where "the violation is apparent on the face" of an assigned instrument. Ford cannot be both a creditor and a subsequent assignee. *Meyers* supra, 539 F.2d 511, at 515. Since Ford was a creditor, its liability is not restricted to violations "apparent on the face of the instrument assigned."

VII

While three violations of the Act and Reg. Z have been found in this case, the plaintiff may recover only once. Section 130(g) of the Act precludes multiple recoveries for multiple violations. 15 U.S.C. §1640(g). Furthermore, a plaintiff may not recover against each defendant separately.

> The [defendants] herein acted jointly in extending the credit and they were responsible for making a joint disclosure of the information required by the Act and Reg. Z. Imposing separate liability on the joint creditors in this single consumer credit transaction does little to further the general purposes of the Act and is not mandated by practical considerations or the statutory language.

Meyers, supra, 539 F.2d at 521.

Accordingly, judgment will be entered for the plaintiff for $1,000.00, plus costs. Plaintiff's counsel will be awarded reasonable attorneys fees, as permitted by the Act. 15 U.S.C. §1640(a). If the parties to this lawsuit do not agree on the amount of attorneys fees, they may submit the matter to this court for further proceedings.

[Illegible]
United States District Judge

New Orleans, Louisiana
April 14, 1977

Judgment.

United States District Court, Eastern District of Louisiana.

Janet Cenance versus Bohn Ford, Inc. and Ford Motor Credit Company. Civil Action No. 76-2878.

This cause came on for trial on a previous day, and for the written reasons filed herein, and the direction of the Court that judgment be entered,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Janet Cenance, and against defendants, Bohn Ford, Inc. and Ford Motor Credit Company, in amount of $1,000.00, plus costs.

IT IS FURTHER ORDERED that counsel for plaintiff is awarded attorney's fees, to be agreed upon.

Dated at New Orleans, Louisiana, this 18 day of April, 1977.

[Illegible]
United States District Judge

Joseph W. Thomas, Esq.
Peter A. Feringa, Jr., Esq.
Ms. Norris Williams
William J. Wegmann, Esq.

United States District Court, Eastern District of Louisiana.

Nicole Antonio versus Canal Motors, Inc. and Ford Motor Credit Company. No. 74-3163, Civil Action.

Filed: Nov. 18, 1977.

SCHWARTZ, J.

This matter came on for hearing on a previous day and was submitted to the Court pending further supplemental memoranda from counsel. Subsequently, Defendant moved to strike portions of Plaintiff's Suggested Findings of Fact and Conclusions of Law which had been filed as supplemental memoranda. The Court has been advised by counsel for Plaintiff that he did not intend to extend and add to the record by such supplemental memoranda, and accordingly the motion to strike was denied as moot. After due consideration of the argument and memoranda of counsel, the record and the law, the Court rules as follows:

The complainant, Nicole Antonio, instituted this action for penalties, damages, costs and attorney's fees pursuant to the Truth in Lending Act of 1968 (hereinafter "the Act"), 15 U.S.C. 1601 et seq., and 12 C.F.R. 226 et seq., (Regulation "Z"). It is alleged that Defendants are creditors under the Act, and have violated these enactments by stating an incorrect finance charge and Annual Percentage Rate in violation of 12 C.F.R. 226.4 and 226.5 respectively.

The Defendants, Canal Motors, Inc.[1] and Ford Motor Credit Company (hereafter "Ford") filed individual answers generally denying the allegations of the complaint.

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[1]Insofar as Canal Motors, Inc. has been represented to the Court to have been "in Liquidation and defunct", its counsel of record was thus permitted to withdraw from this cause, and plaintiff's motion to dismiss Canal Motors, Inc. without prejudice was granted. Thus, the only party defendant remaining in this matter for all intents and purposes is Ford Motor Credit Company.

Specifically, Ford avers that it was only a subsequent assignee of the note and mortgage in question and, alternatively Ford avers that if there was a violation of the Act, then such violation was not intentional and resulted from bona fide error excusable under 15 U.S.C. § 1640(c).

To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact they are adopted as such.

FINDINGS OF FACT

Counsel for Mr. Antonio and Ford entered into a joint stipulation of facts which forms the sole factual predicate[2] for the adjudication of this case. The facts are as follows:

1. On 16 July 1974, Nicole Antonio purchased from Canal Motors, Inc., Seller, a new 1974 Ford automobile.

2. A copy of the mortgage and disclosure statement, the original of which is attached to this stipulation, was given to plaintiff in its entirety.

3. The automobile was purchased by plaintiff for her personal use.

4. The Louisiana Automobile Retail Installment Contract, note and mortgage was assigned for value by the Seller, Canal Motors, Inc., to Ford Motor Credit Company.

5. Following the assignment, and within fifteen (15) days of the sale and mortgage, plaintiff was notified in writing that the assignment had taken place and that payment should be made to Ford Motor Credit Company.

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[2]At the trial of this matter on July 28, 1977, only oral argument of counsel was given in support of their respective positions and, the case was thus submitted solely on the stipulated facts, augmented by oral argument.

6. Ford Motor Credit Company did not fill in any portion of the note and mortgage, nor did Ford Motor Credit Company tell the dealer what information to put into any of the blanks in the note and mortgage form.

7. Ford Motor Credit Company received a credit application from Canal Motors, Inc. regarding plaintiff on or about 15 July 1974. Ford Credit purchased the contract on 22 July 1974.

8. The Louisiana Automobile Retail Installment Contract (sale and chattel mortgage) used by Canal Motors, Inc. in this transaction was printed by a professional printer at the direction of Ford Motor Credit Company. Defendant, Ford Motor Company, believes that an employee or salesman of the defendant, Canal Motors, Inc., completed the Louisiana Automobile Retail Installment Contract executed by plaintiff and Canal Motors, Inc. Ford Motor Credit Company provided the Louisiana Automobile Retail Installment Contract form, in blank, to Canal Motors, Inc. either by manual delivery or through the United States mail.

9. Ford Motor Credit Company purchased the discounted contract (Louisiana Automobile Retail Installment Contract) from Canal Motors, Inc. for a total consideration of $3,753.05 on 22 July 1974.

10. Ford Motor Credit Company had a contract with Canal Motors, Inc. pursuant to which a portion of the consideration paid to the dealer in connection with the purchase of contracts was paid into the Dealer Preoceeds [sic] Withheld account against which Ford Motor Credit Company reserved the right to setoff certain losses, if any, which might be sustained on the contracts purchased from Canal Motors, Inc.

11. During 1974, Ford Motor Credit Company purchased 674 Louisiana Automobile Retail Installment Contracts from Canal Motors, Inc.

12. Ford Motor Credit Company purchased during

1974 less than 50% of all retail installment contracts sold by Canal Motors, Inc.; and, Canal Motors, Inc. regularly sold its Louisiana Automobile Retail Installment Contracts to the following banks and finance companies in addition to selling to Ford Motor Credit Company:

a) First National Bank of Commerce
b) Hibernia National Bank
c) Bank of New Orleans
d) Creditthrift of America, Inc.
e) Beneficial Finance Company
f) Town Finance Company
g) Courtesy Finance Company

13. Canal Motors, Inc. was not required by Ford Motor Credit Company to use the forms supplied by Ford Motor Credit Company and referenced in Stipulation No. 8 in connection with the instant transaction or any transaction.

14. Ford Motor Credit Company was not obligated contractually or otherwise to purchase the Louisiana Automobile Retail Installment Contract identified as Exhibit A attached hereto, prior to the actual purchase on 22 July 1974, nor was Canal Motors, Inc. required to sell any of its Louisiana Automobile Retail Installment Contracts to Ford Motor Credit Company, either contractually or otherwise.

The Louisiana Automobile Retail Installment Contract, (attached to the stipulated facts and made a part of the record) on its face and in the upper left cornew [sic] reads "Account No. *FMCC*." Additionally, to the left of the signatory line bearing Plaintiff's signature, and directly above the sellers signature is the following typewritten statement:

"The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in

> accordance with the terms of the assignment set forth on the reverse side hereof."

Other than these two references, the Contract fails to relate on its face to Ford in any other capacity.[3]

The Court finds it unnecessary to decide whether or not Ford is an arranger or extender of credit and thus a "creditor" under § 226.2(m)[4] of the Act.[5] The Court first addresses the crucially important and dispositive question of whether there has been any recognizable violation under the Act. In this respect, Plaintiff's only viable contention, in light of the stipulated facts, is that the disclosure of Ford's name as a creditor should have been made clearly, conspicuously and in a meaningful sequence on the face of the instrument, as required by 12 C.F.R. § 226.6(a) and (d).

In rebuttal, Ford contends that "the disclosure statement provided to plaintiff completely and accuratley [sic] described the relationship of the parties and Ford Credit's potential involvement as an assignee of the paper." This pivotal issue alone is the focus of the Court's inquiry.

Far from being settled, the jurisprudence has taken divergent stances on the requirement of whether or not the

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[3]However, clause 16 on the face of the contract, printed approximately one inch above the buyer's signature, refers to the "Additional Terms and Conditions" set forth on the reverse side and incorporated therein by such reference; on the reverse side, clause 17 refers to the assignment and buyer's duties if such assignment occurs; and the actual assignment thereof to Ford by the Seller, as it appears on the reverse side, is set forth in its entirety.

[4]12 C.F.R. §226.2(m) (1974) reads:

> "(m) 'Creditor' means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit."

[5]Under a similar factual setting, this issue has been thoroughly exhausted in *Meyers v. Clearview Dodge* 539 F 2d 511 (5th Cir. 1976). Also see *Joseph v. Norman's Health Club*, 532 F 2d 86 (8th Cir. 1976); *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F 2d 102, 105 n. 2 (3rd Cir. 1976)

name of the creditor extendor, becoming such through anticipated assignment of the contract, should be identified as as [sic] a creditor on the seller's disclosure statement. Some courts have simply concluded that an anticipated assignee who is a "creditor" under the Act must clearly identify itself as such on the disclosure statement. See *Lauletta vs. Valley Buick* 421 F. Supp 1036 (W.D. Pa., 1976); and *Cenance vs Bohn Ford, Inc. and Ford Motor Credit Company,* NO 76-2878 (E.D. La., Section "C", Apr. 14, 1977); *Milhollin vs. Ford Motor Credit Co.* No. 75-334 (D.C. Ore., Apr. 7, 1976).

Other courts have held that fair disclosure on the face of the contract of seller's relationship with the prospective assignee satisfied the requirements 12 C.F.R. § 226.6(d). See *Augusta v Marshall Motor Co., et al* No. 77-430 (N.D. Ohio, Eastern Div., Sept. 9, 1977); *Main v Fallar Ford, Inc. and Ford Motor Credit Co.,* No. 74-337 (W.D. Pa., Apr. 22, 1976); *DeMuzio v Westinghouse Credit Corporation,* No. C-1-74-61 (S.D. Ohio, W.D., Nov. 1975)

Assuming *arguendo* that Ford is a creditor, the Court looks to the 12 C.F.R. § 226.6(d) in order to allocate liability between Ford and the seller, Canal Motors, Inc. Section 226.6(d) provides:

> (d) Multiple creditors; joint disclosure. If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship whith [sic] the customer. If two or more creditors make a joint disclosure, each creditor shall be clearly identified. The disclosures required under paragraphs (b) and (c) of § 226.8 shall be made by the seller if he extends or arranges for the extension of

credit. Otherwise disclosures shall be made as required under paragraphs (b) and (d) of § 226.8.

Another division of this Court in *Williams v Bill Watson Ford, Inc.* 423 F Supp. 345 (E.D. La., Div. "G", 1976) considered a similar set of facts involving Ford Motor Credit Company and found several Truth-in-Lending violations but did not touch upon the subject issue at hand. After the rendition of the *Meyer* decision, *supra,* the Court, in a supplemental opinion, considered Ford to be a creditor within the meaning of the Act. The Court then looked to the provisions of 12 C.F.R. §226.6(d) in deciding how to allocate the responsibilities of disclosure in credit sales. After reviewing the decisions of *Manning, supra,* and *Hinkle v Rock Springs National Bank* 538 F. 2d 295 (10th Cir., 1976), the *Williams* court adopted the *Hinkle* rationale. Having further explored and disected [sic] § 226.6(d), in light of *Hinkle,* the *Williams* court made there [sic] observations:

> "(5) The first sentence of 226.6(d) is a general instruction on the allocation of liability among multiple creditors.
>
> 'If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer.'
>
> The test posed by this sentence applies whether each creditor issued his own disclosure statement or whether all creditors issue on joint statement. The test is two-pronged. Before finding one particular creditor among multiple creditors liable for a failure to disclose, it must be determined that (1) the information withheld was within his knowledge, and (2) the information withheld

> was within the purview of his relationship with the customer."

The Court concluded that the seller, not Ford, had peculiar knowledge of the items violating the Act, and such items were within the "purview" of the seller-consumer relationship. Thus only the seller was held liable for the violation.

This approach to § 226.6(d) is sound and logical and, accordingly, the Court herein adopts it as its own.

Here, at the time of the consumer transaction, clearly Ford was a prospective assignee of the installment contract, having approved the financing thereon on the previous day. Equally true, neither Ford nor the seller Canal Motors, Inc. were contractually bound to enter the assignment agreement (Stipulation #14). In fact, *less than 50%* of all retail installment contracts sold by Canal Motors were sold to Ford (Stipulation #12). Thus while there may have been a reasonable anticipation that Ford and Canal Motors would enter numerous like transactions in any given year (674 during 1974, Stipulation #11), neither the seller nor Ford had a contractual obligation to do so once the consumer transaction was consummated.[6] It follows that the only disclosure at the time of the consumer transaction which was within the peculiar knowledge of both Canal Motors, Inc. and Ford was that Ford may become the assignee of the contract.

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[6]This is especially true since the actual assignment, found on the reverse side of the installment contract, significantly provides in its last sentence:

> "This assignment shall become effective upon delivery of the within contract to FMCC or upon FMCC's payment of the purchase price therefor whichever first occurs"

In the event the seller fails to deliver the contract and FMCC does not pay the price therefor, the assignment never comes into existance.

Moreover, Clause 17 of the contract gives additional notice of the assignment and is couched in discretionary terms: "The original Seller *may* assign this contract. . ." (emphasis added)

Inasmuch as the Act and Regulations fail to delineate the manner by which a "creditor" is to be disclosed, the Court specifically finds, having carefully studied the installment contract, that fair and conspicuous disclosure of Ford's true relationship with the transaction has been clearly fulfilled on the fact of the instrument within reasonable proximity to the consumer's signature.[7] Under these circumstances, in clear conscience, the Court is unable to find a disclosure violation 12 C.F.R. § 226.6(d); *Augusta v Marshall Motor Co.*, supra.

The avowed and stated purpose of the federal truth in lending legislation is to assure "meaningful disclosure of credit terms" thus allowing the consumer to make informed choices as to the cost of available credit terms. 15 U.S.C. § 1601. *Pennino v. Morris Kirschman & Co., Inc.* 526 F 2d 367 (5th Cir. 1975). To additionally require Ford to make a separate disclosure to the plaintiff regarding its "creditor" status once the assignment took place would not further the purpose of the Act. In this spirit, the Court approbatively cites from *Main v Fallar Ford Inc. and Ford Motor Credit Co., supra:*

> "Whether Ford Credit may be described as a "creditor" as the term is used in §226.6(d) need not be decided in this factual context because to require such a disclosure by Ford Credit on a separate piece of paper would not be a meaninful [sic] disclosure nor would it further the goals of the Truth in Lending Act. Ford Credit was accurately described in the contract as the assignee and it is undisputed that plaintiff personally understood that Ford Credit would actually extend here

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[7]The consumer is further alerted to the terms and conditions on the reverse side which include Clause 17 entitled "Assignment" and the entire bottom portion of the reverse side which also is boldly captioned as "Assignment." See footnote #3 above.

> [sic] credit and consequently be the recipient of her monthly installment payments. In her deposition, plaintiff states that she was familiar with the final arrangement provided by defendant Fort [sic] Credit to Ford dealers because her fiance (now husband) had financed a car through them. Plaintiff, through her conversation with Faller's sales person, was also aware that the financing of the Pinto automobile would be provided by defendant Ford Credit if her credit record was acceptable. To adopt plaintiff's argument would not advance the goals of the Act. Section 226.6(d) places the obligation upon the seller who arranges for the credit to make the statutory disclosures.[10] See *Manning v. Princeton Consumer Discount Co.* and Springfield, *supra,* and Faller made such disclosures. To require Ford Credit to also disclose to plaintiff that it was also a "creditor" within the Act would be a meaningless and needless exercise providing plaintiff with duplicative information and such duplication cannot be justified by the Act's purpose nor by the practical considerations of these circumstances. (Footnote omitted).

In any event, "Following the assignment, and within (15) days of the sale and mortgage, plaintiff was notified in writing that the assignment had taken place and that payment should be made to Ford Motor Credit Company." (Stipulation #5).[8]

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[8]Any misunderstanding or failure to disclose Ford's relationship to the consumer may have been cured by such prompt notification of the assignment within 15 days or the actual transaction under 15 U.S.C. § 1640(b); which reads:

> 15 U.S.C. § 1640(b) provides:
>
> "*Correction of error within fifteen days*
> A creditor has no liability under this section if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notified the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a finance charge in excess of the amount of percentage rate actually disclosed."

Accordingly, see *Augusta, supra;* however, there is jurisprudence to the contrary which would indicate that this statutory exemption is limited to clerical errors. See *Jumbo v. Nester Motors, Inc.* 428 F Supp. 1085 (D.C. Ariz., 1977); *Palmer v Wilson* 502 F 2d 860 (9th Cir., 1974).

Having found no actionable violation to speak of, the Court need not discuss the issue of whether Ford really was a creditor.

For these reasons assigned, Plaintiff's complaint is DISMISSED with prejudice in its entirety. The Clerk of Court shall enter judgment accordingly.

New Orleans, Louisiana, this 17th day of November, 1977.

[illegible]
United States District Judge

Judgment.

United States District Court, Eastern District of Louisiana.

Nicole Antonio vs. Canal Motors, Inc., et al. Civil Action. No. 74-3163. Section "A".

Filed: Nov. 21, 1977

Considering the written reasons on file herein; and the Court having directed the entry of judgment, accordingly;

IT IS ORDER, ADJUDGED AND DECREED that there be judgment in favor of defendant, Ford Motor Credit Co., and against plaintiff, Nicole Antonio, dismissing plaintiff's complaint with prejudice.

New Orleans, Louisiana, this 18th day of November, 1977.

/s/ NELSON B. JONES,
Nelson B. Jones, Clerk

APPROVED AS TO FROM [sic]:

[Illegible]
United States District Judge

Recommendation of Special Master.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Marion Shropshire, Plaintiff, vs. George Thompson Ford, Inc. and Ford Motor Credit Corp., Defendants. Civil Action No. C75-2290A.

Filed: Nov. 29, 1977.

This truth in lending case was remanded to this Special Master by Order entered November 23, 1976. That Order held George Thompson Ford, Inc. liable for a civil penalty for including a documentary service fee in the cash price. On remand, this Special Master was to make a recommendation whether Ford Motor Credit Corp. ("Ford Credit") is jointly and severally liable for that violation.

Trial was held before this Special Master to determine the relationship between Ford Credit and its dealer, George Thompson Ford, and to determine Ford Credit's knowledge of the inclusion of the documentary service charge in the cash price. Following are this Special Master's Findings of Fact, Conclusions of Law and Recommendation.

I.

FINDINGS OF FACT.

This Special Master finds these facts. George Thompson Ford, Inc. is a car dealer, selling cars at retail. Ford Credit finances retail installment sales of cars and regularly does this type of business with the dealer. The dealer never, or almost never, sells a car to be paid for in installments unless a consumer finance company agrees in advance to take an assignment of the installment sales contract, with the consumer finance company paying the dealer the cash price of the car on acceptance of the assignment. The car dealer cannot afford to finance credit sales of cars.

When the prospective purchaser of a car looks to the dealer to arrange financing, the dealer takes credit information and sends it, along with the terms of the proposed car sale, to one or more consumer finance companies. Sometimes, more than one consumer finance company approves the credit and expresses a willingness to accept the assignment. If more than one consumer finance company expresses such a willingness, the dealer decides which to choose. This decision is often based on how great a remuneration the consumer finance company offers the dealer out of the collected finance charges. Perhaps the recourse provisions of the assignment would also be of some importance to the dealer.

After getting the credit approval of a consumer finance company, the dealer consummates the retail installment sale on a form approved by the consumer finance company that the dealer has selected. With Ford Credit the retail installment contract and the assignment are on the same form and the assignment is contemporaneous with the execution of the contract. Ford Credit, like virtually all consumer finance companies, does not attend the consummation of the purchase and does not learn that the dealer has accepted its offer to accept an assignment until it receives in the mail the retail installment contract and assignment, along with a draft drawn by the dealer. Ford Credit then reviews the contract to make sure that it is in proper form. This review includes the terms of the contract and the truth in lending disclosures. If there is an error, Ford Credit does not pay the draft but sends the papers back for the dealer to make the necessary corrections with the purchaser. If this is done to Ford Credit's satisfaction, it will accept the assignment by honoring the draft.

It is not quite clear what would happen if after approving the credit but before accepting the assignment, Ford changes

its position about the credit worthiness of the purchaser. This Special Master inquired into that. Ford Credit would recognize at least a moral obligation. It might be relevant in fixing a legal obligation whether the dealer was culpable in taking or transmitting the credit information.

When the contract in question was assigned to Ford Credit, it knew that many of its dealers included documentary service charges in the cash price. Ford Credit condoned this practice because it, like many others, believed that this was not a violation of the Truth in Lending Act. Ford Credit thus had strong reason to suspect that a documentary service fee might be included in this cash price.

Likewise, by knowledge of its dealers' practices, Ford Credit had strong reason to suspect that the dealer had imposed a charge for a certificate of title and other official fees. Since no such charge was disclosed in the space provided on Ford Credit's form for retail installment contract, Ford Credit had strong reason to suspect that these charges were lumped into the cash price.

The strong suspicion that the documentary service and official fee charges were included in the cash price becomes a virtual certainty when certain worksheets submitted by the dealer are compared with the disclosures on the retail installment contract. Those worksheets, submitted with the credit information, show how the terms of the contract are calculated. The worksheet shows both documentary service charges and charges for official fees. The calculations correspond exactly with the terms of the contract and lead to the conclusion that the documentary service charges and charges for official fees are included in the cash price.

II.

CONCLUSIONS OF LAW.

The Truth in Lending Act specifies that a subsequent assignee is not liable for a truth in lending penalty unless the disclosure error is apparent on the face of the instrument

assigned. This is provided by 15 U.S.C. 1614. The instrument assigned is the retail installment contract. It is not apparent from the face of that contract that the documentary service charge or the charge for the certificate of title is included in the cash price. Ford Credit's virtual certainty of these inclusions comes from knowledge of its dealers' practices and review of the dealers' worksheets, which are not an assigned instrument.

Read literally, 15 U.S.C. 1614 does not impose liability on Ford Credit for a disclosure error not apparent from the face of the retail installment contract alone, if Ford Credit is a subsequent assignee. This Special Master believes that the statute should be read literally. A literal reading does not condone some mischief that the statute was obviously designed to remedy. Because it is technical, the Truth in Lending Act and Regulations are generally read literally in imposing liability. *E.g., Pennino v. Morris Kirschman & Co.*, 526 F.2d 367 (5th Cir. 1976); *Grant v. Imperial Motors*, 539 F.2d 506, 510 (5th Cir. 1976). It should similarly be read literally to exonerate from liability where, as here, there is no clear reason for a different reading.

Thus, if Ford Credit is a subsequent assignee, it is not liable with the dealer for the inclusion of the documentary service fee in the cash price. But under the authority of *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511 (5th Cir. 1976); *Cenance v. Bohn Ford, Inc.*, 430 F. Supp. 1064 (E.D. La. 1977); and *Smith v. General Finance Corp.*, C76-358A (Edenfield, J. 1977), Ford Credit, as an extender of credit, is a creditor and jointly liable with the dealer, an arranger of credit. In *Cenance*, a subsequent assignee is defined as one who does not participate in the credit decision until after the assignment. Ford Credit obviously does not meet that test.

It is immaterial that Ford Credit is not present at the consummation of the installment sales contract, does not know that the dealer will include a documentary service charge in the cash price, and does not know that the contract will be assigned to it. Ford Credit could insist on being present, and oversee every detail of the disclosures of the contract terms. But Ford Credit is content not to. That does not render Ford Credit any less an extender of credit, within the meaning of the Truth in Lending Act. The key fact making Ford Credit a creditor is the prior approval of credit.

It is likewise immaterial that Ford Credit can reject the assignment of an improperly prepared or disclosed contract. This Special Master doubts that Ford Credit could reject an assignment because of a change in position as to the credit worthiness of the consumer unless the dealer is culpable in taking or transmitting credit information. But even if Ford Credit, for cause, can reject the assignment, that, like the matter of whether the assignment is with recourse and the matter of whether the parties have agreed to indemnification for truth in lending liability, goes to the agreed division of risk between Ford and the dealer rather than the question of whether Ford is an extender of credit.

In *Smith v. General Finance Corp.*, C76-358A (Edenfield, J. 1977), this Court took a view similar to that taken in *Cenance v. Bohn Ford, Inc.* In *Smith*, as in *Cenance*, the court declined to follow *Williams v. Bill Watson Ford, Inc.*, 423 F.Supp. 345 (E.D. La. 1976). In *Smith*, the Court held that where a car dealer as an arranger of credit and a consumer finance company as an extender of credit provided one disclosure statement, with the dealer providing the financial terms of the contract on a form provided by the consumer finance company, both were jointly and severally liable for any error. There was no division of liability based on who had undertaken to furnish what information to the

consumer. The court in *Smith* noted 12 C.F.R. 226.6(d), which provides for each creditor being responsible for only those disclosures within his knowledge and the purview of his relationship with the customer. The court in *Smith* held that the court in *Meyers* properly did not apply that regulation because it referred to multiple creditors, not joint creditors, which the car dealer and the consumer finance company in *Meyers* were.

Ford Credit requests a stay of this case until its appeal in the case of *Cenance v. Bohn Ford, Inc.* is concluded. But final resolutions of that case can easily take another year. And the final resolution might still leave Ford Credit with a question as to its liability in this case. Furthermore, the District Court in this case may wish to express contrary views to those expressed herein and find for Ford Credit. In all, the goal of speedy and specific adjudication of litigation favors denial of the stay.

III.

RECOMMENDATION.

WHEREFORE, it is recommended that plaintiff have judgment jointly and severally against defendants for a truth in lending penalty of $1,000, and a reasonable attorney's fee of $700. The plaintiff's attorney is directed to submit by December 12, 1977 an affidavit of legal services rendered since November 23, 1976, for this Court to award whatever attorney's fees are reasonable for prosecuting the case since then against Ford Motor Credit Corp. Any objection to the affidavit is to be filed by December 22, 1977. The Clerk

shall then resubmit this case to this Special Master for recommendation of a reasonable attorney's fee.

AT ATLANTA, GEORGIA, this 29th day of November, 1977.

/s/ EZRA COHEN
Ezra H. Cohen
Bankruptcy Judge, Sitting as
Special Master

Order.

United States District Court, Northern District of Georgia, Atlanta Division.

Marion Shropshire vs. George Thompson Ford, Inc. and Ford Motor Credit Corporation. Civil Action No. C75-2290A.

Filed: May 1, 1978.

By order of November 23, 1976, the court concluded that defendant George Thompson Ford, Inc. was liable to plaintiff in this truth-in-lending action. The case was remanded to the special master for a further recommendation with respect to the liability of Ford Motor Credit Corporation, and a ruling on an award of attorney's fees was deferred. The case is now before the court on the resulting recommendation that Ford Motor Credit Corporation be found to be jointly and severally liable with George Thompson Ford for a truth-in-lending penalty of $1,000 and an attorney's fee of $700. A further fee of $450 is recommended, to be assessed against Ford Motor Credit only, for services rendered by plaintiff's attorney subsequent to the finding that George Thompson Ford had violated the truth-in-lending law.

After having read and considered the special master's recommendations, the court finds itself in agreement with his conclusion that Ford Motor Credit Corporation acted as an extender of credit rather than a subsequent assignee and is jointly liable with the automobile dealer who arranged the credit. *See Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 514-15 (5th Cir. 1976), *cert. denied sub nom. Meyers v. Chrysler Credit Corp.*, 431 U.S. 929 (1977). Accordingly, the special master's recommendations are

ADOPTED in their entirety as the opinion and order of the court.*

The clerk is DIRECTED to enter judgment for the plaintiff. Defendants are jointly and severally liable for a truth-in-lending penalty of $1,000.00, an attorney's fee of $700.00, and costs, while defendant Ford Motor Credit Corporation alone is liable to plaintiff for an additional attorney's fee of $450.00.

So ORDERED, this 28th day of April, 1978.

/s/ Newell Edenfield,
Newell Edenfield,
United States District Judge

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*This includes denial of the stay requested by Ford Motor Credit. *See* Special Master's Recommendation of November 29, 1977, at 7.

Judgment.

United States District Court for the Northern District of Georgia, Atlanta Division.

Marion Shropshire vs. George Thompson Ford, Inc. and Ford Motor Credit Corporation. Civil Action File No. C75-2290A.

Filed: May 1, 1978.

This action came on for consideration before the Court, Honorable Newell Edenfield, United States District Judge, presiding, and the issue having been duly considered and a decision having been duly rendered adopting Special Master recommendations.

It is Ordered and Adjudged that the defendants take nothing, the action be dismissed, and the plaintiff, MARION SHROPSHIRE recover of the defendants, jointly and severally, a Truth-In-Lending penalty of ONE THOUSAND & 00/100 DOLLARS ($1,000.00); an attorney's fees in the amount of SEVEN HUNDRED & 00/100 DOLLARS

($700.00) and cost. Plaintiff to recover from defendant FORD MOTOR CREDIT CORPORATION additional attorney's fee in the amount of FOUR-HUNDRED FIFTY & 00/100 DOLLARS ($450.00)

BEN H. CARTER
Clerk of Court

By /s/ CLAUDIA PHILLIPS
Deputy Clerk

Dated at Atlanta, Georgia, this 1st day of May, 1978.

FILED & ENTERED IN CLERK'S OFFICE THIS 1st DAY OF MAY 1978

BEN H. CARTER, CLERK

By /s/ CLAUDIA PHILLIPS
Deputy Clerk

Recommendation of Special Master.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Solomon Wiggs, Plaintiff, Vs. Ford Motor Credit Corporation, Defendant. Civil Action No. 19428.

Filed: Nov. 30, 1977.

On July 23, 1976, this Special Master entered a Recommendation on the merits of the truth in lending contentions. By Order dated December 17, 1976, this case was remanded for reconsideration in light of recent Fifth Circuit opinions dealing with the disclosure of car sales. On May 5, 1977, this remand was transferred from the Magistrate to this Special Master.

Plaintiff's first contention as to liability is the defendant's failure to disclose its right to accelerate unearned interest. As the Court noted in its Order of December 17, 1976, that contention is not well taken in the light of *Martin v. Commercial Securities Co.*, 539 F.2d 521 (5th Cir. 1976). This issue is now being reconsidered en banc in *McDaniel v. Fulton National Bank*, 554 F.2d 1391 (5th Cir. 1977).

Plaintiff's second contention is that charges for credit insurance should have been included in the cash price. This second contention has two bases. The first is that the dealer required the purchase of insurance. The disclosure sheet contains a recital signed by plaintiff that credit insurance was not required. Yet plaintiff has submitted an affidavit reciting, "I was required to purchase credit Life and credit Accident and Health or Disability Insurance." This affidavit does not create an issue of fact because plaintiff does not show that he was specifically and unequivocally informed that credit insurance was required, so as to meet the burden of *Mims v. Dixie Finance Co.*, 426 F.Supp. 627, 637 (N.D. Ga. 1976). By Direction entered October 14, 1977, this

Special Master gave plaintiff fifteen days to make such a showing. Nothing was filed. Therefore, on the authority of *Mims v. Dixie Finance Co., supra,* and *Anthony v. Community Loan and Investment Co.,* 559 F.2d 1363 (5th Cir. 1977), this first basis of plaintiff's second contention is not well taken.

The second basis of the second contention is that the insurance authorization is undated. This basis is not sufficient for two reasons. The first is that Ford appears to have proved that any failure by the dealer to date or have dated the disclosure sheet given defendant was the result of a bona fide clerical error notwithstanding the maintenance of procedures reasonably designed to avoid any such error. *See Mirabel v. General Motors Acceptance Corp.,* 537 F.2d 871 (7th Cir. 1976), and Directions entered October 14, 1977. The second is that the failure to date the insurance authorization is not a violation if the authorization is included in the body of a dated sales contract. *Hayslip v. Dunlap Chevrolet Co.,* 560 F.2d 192 (5th Cir. 1977). That is the case here. Thus, the second basis of plaintiff's second contention is not well taken.

Plaintiff's third contention is that use of the term "the Rule of 78's" to describe the method used to rebate unearned finance charges is not meaningful. That is contrary to *Roberts v. National School of Radio & Television Broadcasting,* 374 F. Supp. 1266 (N.D. Ga. 1974). Thus, plaintiff's third contention is not well taken.

Plaintiff's fourth contention is that defendant is liable for the inclusion in the cash price of a documents fee of $25.00. The facts material to this contention are virtually the same as in *Shropshire v. George Thompson Ford,* C75-2290A. For the reasons set forth in the Recommendation dated November 29, 1977 in *Shropshire v. George Thompson Ford,*

supra, that contention is well taken. Attached is a copy of that Recommendation.

Plaintiff's fifth contention is that defendant failed to identify the type of security interest taken. But the defendant has disclosed that there is taken "a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash [of the indebtedness]." This is sufficient under *Anthony v. Community Loan & Investment Corp.*, 559 F.2d 1363 (5th Cir. 1977). Thus, plaintiff's fifth contention is not well taken.

As its sixth contention, the plaintiff was allowed to adopt orally the violation declared in *Edmonson v. Allen-Russell Ford, Inc.*, C75-940A (Edenfield, J. 1976). That was the failure to disclose the security interest in unearned or returned premiums for automobile insurance. But since *Edmonson*, there has been a contrary decision. That is *Shanks v. Greenbriar Dodge*, C75-1154A (Moye, J. 1977). This Special Master declines to make a recommendation on plaintiff's sixth contention, since it is a matter of some doubt and is unnecessary to resolve the litigation.

WHEREFORE, it is recommended that plaintiff have judgment against defendant in the amount of $1,000 as a civil penalty, together with a reasonable attorney's fee and costs. Plaintiff is directed by December 12, 1977 to file an affidavit of legal services rendered since July 30, 1976. Any objection should be filed by December 22, 1977. The Clerk shall then resubmit this case to the Special Master for recommendation of a reasonable attorney's fee.

AT ATLANTA, GEORGIA, this 30th day of November, 1977.

/s/ EZRA COHEN,
Ezra H. Cohen
Bankruptcy Judge

Order.

United States District Court, Northern District of Georgia, Atlanta Division.

Solomon Wiggs vs. Ford Motor Credit Company. Civil Action No. 19428.

Filed: June 29, 1978.

This Truth-in-Lending action, 15 U.S.C. §1601, *et seq.* and attendant regulations, is presently before the court on defendant's motion for reconsideration of our order of March 21, 1978. Defendant rightfully complains that due to a clerical error its duly-filed objections were not forwarded with the Report and Recommendation of the Special Master for the court's review. Defendant's motion for reconsideration, as it seeks review of the Special Master's Report in light of defendant's objections, must therefore be GRANTED.

The Special Master has: (1) identified a Truth-in-Lending disclosure violation upon the automobile dealer's unspecified inclusion of a $25.00 document fee in the cash price, 12 C.F.R. §§226.4(b) and 226.8(c)(4), *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 517 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 2633 (1977), and (2) recommended an award of $1,000.00 plus interest representing the maximum statutory penalty, 15 U.S.C. §1640(a)(1), and $1,350.00, representing reasonable attorney's fees and costs. Defendant objects to the finding of liability for the identified disclosure violation claiming the limited protection of a "subsequent assignee" when the violation is not apparent on the face of the financing document. 15 U.S.C. §1614. Defendant further objects to plaintiff's accounting of compensable attorney hours, contending that the proper total is 10.9 rather than the claimed 13.9. hours expended after July 30, 1976.

The defendant's attempt to avoid liability by posing as a subsequent assignee is unavailing in this instance. The Special Master has found upon the evidence adduced in this instance and in the related action, *Marion Shropshire v. George Thompson Ford, Inc. and Ford Motor Credit Co.*, C.A. No. 75-2290 (N.D. Ga.) [Recommendation of Special Master filed Nov. 29, 1977], that the defendant credit company is not an innocent "assignee" within the protection of 15 U.S.C. §1614, but is more properly a "creditor" under the Act, *id.* at §1640. The automobile dealer served as a mere conduit for the financing arrangement, while the automobile credit company was the intended creditor in the loan transaction. Upon this finding, the defendant was properly held liable for the Truth-in-Lending disclosure violation of the wrongful inclusion of the $25.00 document fee in the cash price. *Meyers v. Clearview Dodge Sales, Inc., supra; Cenance v. Bohn Ford, Inc.*, 430 F. Supp. 1064, 1069 (E.D. La. 1977).

The defendant challenges the plaintiff's ability to add the hours of attorney hours expended after July 30, 1976. Although plaintiff claims 13.9 hours of attorney time, the defendant contends that the total sum itemized is only 10.9 hours. The court notes that the Special Master has recommended compensation for 11 hours of attorney's fees at the rate of $50.00 per hour. The defendant's objection is therefore without meaningful effect. The court finds that the total recommended attorney's fee award, before and after July 30, 1976, is reasonable within the parameters provided in this circuit. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Wolf v. Frank*, 555 F.2d 1213 (5th Cir. 1977) and cases cited therein. *See also*, ABA Code of Professional Responsibility D.R. 2-106B.

Accordingly, the court has GRANTED defendant's motion for reconsideration of our March 21, 1978, order in

light of defendant's objections to the Special Master's Report and Recommendation. Upon reconsideration, the court once more ADOPTS the Recommendations of the Special Master and ORDERS judgment to be entered for the plaintiff in the amount of $1,000.00 plus interest as the statutory penalty and of $1,350.00 as attorney's fees and costs.

IT IS SO ORDERED.

This, the 28 day of June, 1978.

/s/ RICHARD C. FREEMAN,
Richard C. Freeman
United States District Judge

Judgment.

United States District Court for the Northern District of Georgia — Atlanta Division.

Solomon Wiggs vs. Ford Motor Credit Corporation. Civil Action File No. C.A. 19428.

Filed: July 20, 1978.

This action came on for consideration before the Court, Honorable Richard C. Freeman, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff SOLOMON WIGGS recover of the defendant FORD MOTOR CREDIT CORPORATION the sum of ONE THOUSAND & NO/100 dollars ($1,000.00) civil penalty, plus ONE THOUSAND THREE HUNDRED FIFTY & NO/100 dollars ($1,350.00) as attorney's fees with interest thereon as provided by law and his costs of action.

Dated at Atlanta, Georgia, this 20th day of July, 1978.

BEN H. CARTER
Clerk of Court

By /s/ Mary J. Watson
Deputy Clerk

FILED & ENTERED IN CLERK'S OFFICE
THIS 20TH DAY OF JULY, 1978
BEN H. CARTER, CLERK

By /s/ Mary J. Watson
Deputy Clerk

United States Magistrate's
Report and Recommendation.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Jimmy W. Farrell, Plaintiff, vs. Frank Jackson Motors, Inc., d/b/a Jackson AMC-Jeep, Defendant. Civil Action No. 77-1194.

Filed: June 27, 1978.

This action is now before the Court on motion for summary judgment submitted by both the plaintiff and defendant concerning plaintiff's complaint brought pursuant to the Federal Truth-in-Lending Act, 15 U.S.C. §1601, *et seq.* Plaintiff alleges that defendant has violated the Act in several particulars, while defendant has filed a brief in opposition to plaintiff's motion.

TRUTH-IN-LENDING VIOLATIONS.

The most apparent of the alleged Truth-in-Lending violations deals with the status of Ford Motor Credit Corporation (hereinafter referred to as FMCC), in the underlying installment credit sales transaction. It is plaintiff's position that FMCC is a creditor within the meaning of Regulation Z, whose identity and location should have been disclosed prior to the consummation of the contract. Regulation Z 12 C.F.R. §226.2(s); §226.6(d); *Wellmaker v. W. T. Grant Co.*, 365 F.Supp. 531 (N.D. Ga. 1972). A line of cases has labeled this argument as the "conduit theory" whereby a financial institution, such as FMCC, has been held to be a co-creditor when the dealer acts simply as a conduit for placing a finance company's contracts with consumers and then regularly assigns the executed contracts to the financial institution. *Meyers v. Clearview Dodge Sales, Inc.*, 384 F.Supp. 722 (N.D. Ga. 1974), aff'd 539 F.2d 511 (5th Cir. 1976); *Philbeck v. Timmers Chevrolet, Inc.*, 361 F.Supp.

1255 (N.D. Ga. 1973), rev'd on other grounds, 499 F.2d 971 (5th Cir. 1974). Additional evidence indicating the existence of a credit extender-arranger relationship includes: the use by the dealer-arranger of the extender's financial loan papers; the arrangement of an assignment of the commercial paper to the extender prior to or contemporaneously with the final execution of the contract between the consumer and the arranger of credit; and the fact that the dealer does not ordinarily finance credit sales itself, but through its regular course of business submits financial applications to institutional creditors with whom it regularly deals for approval of the consumer's credit. Where an ongoing business relationship exists between the parties, Regulation Z, 12 C.F.R. §226.8(a) and case law requires that both the arranger and extender be disclosed as creditors. In cases of multiple creditors both parties shall be held liable for any violation of the Truth-in-Lending Act and accompanying regulations. *Meyers, supra.*

Defendant's admissions in the instant case conclusively establish FMCC as an extender of credit. In spite of defendant's assertion that a genuine issue of material fact exists concerning the dealership's customary practice of obtaining credit approval from a financial institution prior to the completion of a credit contract, there is ample evidence documenting the factors *Meyers supra,* and *Philbeck, supra,* have determined to indicate the presence of multiple creditors. Frank Jackson Motors, Inc. has stated it does not ordinarily finance credit sales itself; rather it submits a financial statement of a potential buyer to a financial institution with whom it regularly deals for approval. Furthermore, defendant used forms and manuals issued by FMCC in preparing the loan papers. More importantly, in this particular transaction, defendant received notification from FMCC prior to the completion of the automobile sale, that

FMCC had approved plaintiff's credit application and would accept the assignment of any commercial paper executed by defendant and plaintiff. The admissions submitted by defendant reveal obvious parallels with *Meyers, supra.* Therefore, as in *Meyers, supra,* defendant-Frank Jackson Motors, Inc. should be found to have violated the Truth-in-Lending Act by its failure to adequately disclose all the creditors involved in the credit transaction.

Plaintiff has asserted other instances where defendant should be found to have failed to comply with the Act and Regulation Z. However, since there may be only one recovery per single consumer sale, regardless of the number of violations present in that transaction, 15 U.S.C. §1640(g); *Turner v. Firestone Tire & Rubber Co.,* 537 F.2d 1296 (5th Cir. 1976),[1] and the failure to disclose FMCC, the extender of credit, as the creditor, is a clear violation of the requirements of the Act, there is no need to proceed with the discussion of the issues presented by plaintiff at this time.

CONCLUSION.

For the reasons stated above the plaintiff should have judgment on the Truth-in-Lending violation. Plaintiff is thus entitled to recover the statutory penalty of twice the finance charge, in this case the maximum, of $1,000. Additionally, the plaintiff is entitled to costs and reasonable attorney fees. In the event that this Report and Recommendation is adopted as the opinion and order of the District Court, the attorney for the plaintiff is directed to file with this Magistrate within ten (10) days of the receipt of the order of the District Court his claim and affidavit of attorney fees. The defendant shall

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[1]The sole exception: allowing multiple recovery where there is the continuing failure to disclose after recovery has been granted, is not applicable to the present transaction.

be allowed ten (10) days from the receipt of the claim in which to object.

SO REPORTED AND RECOMMENDED this 26th day of June, 1978.

/s/ JOHN E. DOUGHERTY,
John E. Dougherty
United States Magistrate

Order.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Jimmy W. Farrell, Plaintiff, vs. Frank Jackson Motors, Inc. d/b/a Jackson AMC-Jeep, Defendant. Civil Action No. 77-1194.

Filed: June 27, 1978.

Let a copy of this Report and Recommendation be served upon counsel for the parties. Counsel for the parties will be allowed ten days from the receipt of this Report and Recommendation to file objections thereto. If no objections are made, this Report and Recommendation will be adopted as a record of the proceedings and may become the opinion and Order of the Court.

The Clerk is directed to submit the Report and Recommendation with objections, if any, on July 7, 1978.

SO ORDERED this 26th day of June, 1978.

/s/ JOHN E. DOUGHERTY,
John E. Dougherty
United States Magistrate

Order.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Jimmy W. Farrell vs. Frank Jackson Motors, Inc., d/b/a Jackson AMC-Jeep. Civil No. C77-1194A.

Filed: Nov. 30, 1978.

This truth-in-lending action is before the court on the report and recommendation of the magistrate as to attorney's fees. The magistrate determined from attorney for plaintiff's affidavit and from the nature of the suit in question that approximately 9.6 hours were reasonably spent. The magistrate furthermore recommended that plaintiff be compensated at the rate of $50.00 per hour for a total of $480.00. Plaintiff objects to the recommendation, stating that he should be awarded the full 11.2 hours claimed and should be compensated at the enhanced rate of $66.67 per hour. *Cf. Wolf v. Frank*, 555 F.2d 1213 (5th Cir. 1977). The rule of this court has been to award $50.00 per hour for attorney's fees in truth-in-lending cases. *See Slatter v. Aetna Finance Co.*, No. 18279 (N.D. Ga. Oct. 25, 1978); *Stewart v. Atlanta Hypnosis Institute, Inc.*, No. C78-654A (N.D. Ga. Oct. 10, 1978). There is no indication that any unusual circumstances exist in this case to warrant extraordinary compensation. Accordingly, the court finds the magistrate's determinations as to both time reasonably spent and hourly rate to be well justified and hereby adopts said report and

recommendation as the opinion of the court. The clerk is directed to enter judgment for plaintiff in the sum of $1,000.00, plus costs and attorney's fees in the sum of $480.00.

IT IS SO ORDERED this 29th day of November, 1978.

/s/ WILLIAM C. O'KELLEY,
William C. O'Kelley
United States District Judge

Judgment.

United States District Court for the Northern District of Georgia, Atlanta Division.

Jimmy W. Farrell vs. Frank Jackson Motors Inc. d/b/a Jackson AMC-Jeep. Civil Action File No. C77-1194A.

Filed: Nov. 30, 1978.

This action came on for consideration before the Court, Honorable William C. O'Kelley, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, adopting report & recommendation of Magistrate, granting plaintiff's motion for Summary Judgment.

It is Ordered and Adjudged that the defendant, FRANK JACKSON MOTORS INC. d/b/a JACKSON AMC-JEEP take nothing, that the action be dismissed and the plaintiff, JIMMY W. FARRELL recover of the defendant ONE-THOUSAND & 00/100 dollars ($1,000.00) statutory damages and FOUR-HUNDRED EIGHTY & 00/100 ($480.00) attorney's fees and costs of action.

Dated at Atlanta, Georgia, the 30th day of November, 1978.

Ben H. Carter
Clerk of County
BY /s/ Claudia Phillips
Deputy Clerk

FILED & ENTERED IN CLERK'S OFFICE
THIS 30th DAY OF NOVEMBER, 1978
BEN H. CARTER, CLERK
BY /s/ Claudia Phillips
Deputy Clerk

Magistrate's Report
and Recommendation.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Nicholas Strzelecki, Plaintiff, vs. Terry Ford Company and Ford Motor Credit Company, Defendants. Civil Action No. C76-1624A.

Filed: June 26, 1978.

This case, brought under the Consumer Credit Protection Act (15 U.S.C. § 1601, *et seq.*), is before the Magistrate on cross motions for summary judgment on the Truth-in-Lending issues. The defendant has filed a plea of set-off and recoupment, but no additional pleadings in support of that contention have been received, and it is not dealt with herein.

The plaintiff purchased a 1976 Ford Pinto from the defendant, Terry Ford. The dealer, at the time of the transaction, did not finance its own sales and in this transaction obtained credit information from the plaintiff and submitted the application to Defendant Ford Motor Credit Co. for approval prior to consummating the sale. The dealer says that if Ford Motor Credit Co. had not approved the credit the sale and financing would not have gone through. Contemporaneous with the execution of the loan documents which purported to show Terry Ford as the creditor, the paper was assigned to Ford Motor Credit. The fact of the assignment appears on the disclosure sheet but is not clearly and conspicuously shown, nor is the address of Ford Motor Credit Company shown.

The plaintiff cites a number of alleged violations of the Truth-in-Lending Act, but the Magistrate feels that it is necessary to treat only two of them. First, it is said that the defendants violated the Act by failing to disclose the identity

of Ford Motor Credit as a creditor. Secondly, the plaintiff shows that the individual components of a charge entitled "License, Title and Registration Fees" were not broken out and individually itemized but instead a lump sum was shown. The plaintiff says that these amounts must be individually itemized to be excludable from the finance charge.

The Magistrate is of the opinion that the plaintiff is correct in the two contentions just enumerated. The rule of the Circuit established by *Meyers v. Clearview Dodge,* 539 F. 2d 511 (5th Cir. 1976), declares that both Terry Ford and Ford Motor Credit were creditors within the meaning of the Act. Both had an obligation, therefore, to disclose the existence of Ford Motor Credit as a creditor and to disclose it adequately. The passing reference in the assignment set down in the lower left hand portion of the contract is inadequate to meet this requirement of the Act. *Copeland v. Harry White Ford,* C75-541A (N.D.Ga. 1978); *Whitehead v. Harry White Ford,* C75-695A (N.D.Ga. 1978) (Recommendations of the Magistrate adopted by Henderson, J., and Freeman, J.). See also the Magistrate's recent Report and Recommendation in the case of *Clark v. Ford Motor Credit,* C77-761A (June 13, 1978).

As noted above, the defendant disclosed a lump sum figure of $10.50 as a charge for the cost of obtaining the license, title and other registration fees. In fact, the dealer incurred separate costs for paying a county tax, obtaining the temporary tag, and having the vehicle inspected. The individual amounts (which in this case exceed the $10.50 lump sum charge were not individually itemized. Generally the defendants take the position that the law requires an itemization only of this "type" of charge, and, indeed, this is a reasonable inference drawn from a reading of 12 C.F.R. 226.4(b)(4). It is said, however, that that section must be

read together with 12 C.F.R. 226.8(c)(4) and that that requires that each component of the lump sum charge be set out. While the contention of the defendants is reasonable, it is contrary to the established law of this District and this Circuit. *See Meyers v. Clearview Dodge*, 539 F. 2d 511 (5th Cir. 1976), *cert. denied sub nom, Meyers v. Chrysler Credit Corp.*, 431 U.S. 929 (1977); *Grant v. Imperial Motors*, 539 F.2d 506 (5th Cir. 1976); *Downey v. Whaley-Lamb Ford Sales*, C75-160A (N.D.Ga. 1977) (Edenfield, J.); *Scott v. Stanley Motors*, C76-1512A (N.D.Ga. 1978) (Edenfield, J.). The failure to show the component parts, therefore, is seen as a violation, and the plaintiff's motion for summary judgment on this point ought to be granted.

As liability may be predicated upon a single violation, the plaintiff's other contentions will not be dealt with here. 15 U.S.C. § 1640(g); *Mourning v. Family Publications Service*, 411 U.S. 356, 376 n. 41; *McGowan v. King, Inc.*, 569 F. 2d 845 (5th Cir. 1978).

CONCLUSION.

For the reasons given, the plaintiff ought to have a judgment for the statutory penalty which in this case would be $1,000.00 plus costs and reasonable attorney's fees. The attorney for the plaintiff is Directed to file a claim for reasonable attorney's fees with supporting itemization and affidavit within ten (10) days of the receipt of any Order by the District Court favorable to the plaintiff on the Truth-in-Lending issues.

As noted earlier, a set-off and recoupment claim was filed in the defendant's answer. No motion for summary judgment on this issue was received within the time allowed by the Order of the Magistrate. If no motion for summary judgment on this issue is filed within 30 days of the date

of this Order the Magistrate will recommend that the plea be dismissed.

SO REPORTED AND RECOMMENDED this 23rd day of June, 1978.

/s/ J. OWEN FORRESTER,
J. Owen Forrester
United States Magistrate

Order.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Nicholas Strezelecki vs. Terry Ford Company and Ford Motor Credit Company. Civil No. C76-1624A.

Filed: Sept. 7, 1978.

This action, brought pursuant to the Consumer Credit Protection Act, 15 U.S.C. § 1601 *et seq.*, is before the court on the report and recommendation of the magistrate. The magistrate found that defendants had violated the Truth in Lending Act by (1) failing to properly and completely identify Ford Motor Credit Co. as a credtior and (2) failing to itemize separately the charges for license, title, and registration fees.

Defendants cite authority from a variety of jurisdictions standing for the proposition that the disclosure of Ford Motor Credit Co. as an "assignee" instead of a "creditor" would satisfy the act. Each case relied on by defendants arose in another circuit, and, furthermore, defendants cite only district court opinions as authority. Although other district courts have a right to disagree, it is the law of this district, and indeed of this circuit, that both the arranger of credit and the extender of credit must be adequately disclosed as creditors. *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511 (5th Cir. 1976); *Whitehead v. Harry White Ford*, Civ. No. C75-695A (N.D. Ga. Mar. 21, 1978); *Copeland v. Harry White Ford*, Civ. No. C75-541A (N.D. Ga. Feb. 2, 1978). Accordingly, defendants' first objection is without merit.

As to the second objection, defendants' contentions are clearly without basis. The Fifth Circuit has stated its position that charges such as license, title, and registration fees should be itemized. *Meyers v. Clearview Dodge Sales, Inc.*,

supra. Although the court agrees with defendants and the magistrate that 12 C.F.R. 226.4(b)(4) and 12 C.F.R. 226.8(c)(4) seem to demand only itemization of this "type" of charge, the Fifth Circuit's language is clear that "Section 226.4(b)(4) clearly requires the itemization and separate disclosure of the charge for 'tag, title and fees.' " *Id.* at 518. *See also Downey v. Whaley-Lamb Ford Sales*, Civ. No. C75-160A (N.D. Ga. Mar. 22, 1977). For the above stated reasons, defendants' second objection is also without merit. Accordingly, the court approves the report and recommendation of the magistrate and hereby adopts it as the opinion and order of the court. The clerk is directed to enter judgment for plaintiff against defendants in the amount of $1000.00. The court reserves ruling on attorney's fees pending review by the magistrate.

IT IS SO ORDERED this 7th day of September, 1978.

/s/ WILLIAM C. O'KELLEY,
William C. O'Kelley,
United States District Judge

Judgment.

United States District Court for the Northern District of Georgia, Atlanta Division.

Nicholas Strezelecki vs. Terry Ford and Ford Motor Credit Company. Civil Action File No. C76-1624A.

Filed: March 30, 1979.

This action came on for consideration before the Court, Honorable William C. O'Kelly, [sic] United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, adopting report & recommendation of Magistrate pursuant to orders of 9/7/78 & 3/30/79

It is Ordered and Adjudged that the plaintiff, NICHOLAS STREZELECKI recover of the defendants TERRY FORD and FORD MOTOR CREDIT COMPANY the sum of ONE-THOUSAND & 00/100 DOLLARS ($1,000.00) penalty and the sum of ONE-THOUSAND & 00/100 DOLLARS ($1,000.00) attorney's fees and costs of action.

Dated at Atlanta, Georgia, this 30th day of March, 1979.

Ben H. Carter
Clerk of Court
By /s/ Claudia Phillips
Deputy Clerk

FILED & ENTERED IN CLERK'S OFFICE
THIS 30TH DAY OF MARCH 1979
BEN H. CARTER, CLERK
By /s/ Claudia Phillips
Deputy Clerk

Order.

United States District Court, Northern District of Georgia, Atlanta Division.

Michael Duane Culver, Plaintiff, v. Ford Motor Credit Company, Defendant. Civil Action File Number C77-666A.

This Truth-in-Lending action is before the Court on the Magistrate's Report and Recommendation of June 23, 1978. The defendant has filed objections to the report and plaintiff has responded. Presently pending before the Court are cross-motions for summary judgment on plaintiff's complaint that disclosures required by the Consumer Credit Protection Act, 15 U.S.C. § 1601 *et seq.*, were not correctly made incident to an extension of consumer credit.

The defendant contends that as an assignee of plaintiff's note, it is not a creditor as that term is used in the Truth-in-Lending law. However, the Magistrate's report correctly cites *Meyers v. Clearview Dodge*, 539 F.2d 511 (5th Cir. 1976), *cert. den sub. nom, Meyers v. Chrysler Credit Corp.*, 431 U.S. 929 (1977), for the proposition that both the credit extender as well as the credit arranger are "creditors" within the context of Truth-in-Lending law. Notwithstanding defendant's citations to other courts, it is clear that in the Fifth Circuit this defendant may be held liable as a creditor for inadequate disclosure. See *Cenance v. Bohn Ford Inc.*, 430 F. Supp. 1064 (E.D. La. 1977).

Defendant's second objection concerns the adequacy of its disclosure. In the lower left hand corner of the Disclosure Statement the following paragraph appears:

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.

The defendant argues that this statement satisfies the requirements of the Act. The Court does not agree.

The language relied on by the defendant identifies it as merely an assignee, rather than a creditor as required by Regulation Z, 12 C.F.R. §§ 226.8(a) and 226.6(d). If defendant's statement was meant as a disclosure of its creditor status, such disclosure was confusing and misleading in violation of Regulation Z, 12 C.F.R. § 226.6(c). Considering defendant's nationwide business activities the confusion is augumented [sic] by defendant's failure to include its address in the disclosure statement. See, *Welmaker v. W.T. Grant Company*, 365 F. Supp. 531, 539-40 (N.D. Ga. 1972). Statements identical to defendant's have been held inadequate in this district. *Whitehead v. Harry White Ford*, C75-541A, (N.D. Ga. March 21, 1978); *Rogers v. Frank Jackson Lincoln-Mercury*, C77-39A, (N.D. Ga. September 27, 1978).

Accordingly, the findings and conclusions of the Magistrate's Report and Recommendation are specifically ADOPTED.

SO ORDERED, this the 28th day of September, 1978.

/s/ Harold L. Murphy
United States District Judge

Judgment.

United States District Court for the Northern District of Georgia, Atlanta Division.

Michael Duane Culver vs. Ford Motor Credit Company. Civil Action File No. C77-666A.

Filed: April 19, 1979.

This action came on for Consideration before the Court, Honorable HAROLD L. MURPHY, United States District Judge, presiding, and the issues having been duly Considered and a decision having been duly rendered, granting plaintiff motion for summary judgment

It is Ordered and Adjudged that the Plaintiff MICHAEL DUANE CULVER recover of the Defendant FORD MOTOR CREDIT COMPANY the sum of $1,000.00 plus costs and attorney [sic] in the the sum of $650.00.

Dated at Atlanta, Georgia, this 19th day of April, 1979.

BEN H. CARTER
Clerk of Court
By: /s/ SALLIE A. MANUEL
Deputy Clerk

FILED & ENTERED IN CLERK'S OFFICE
THIS 19TH DAY OF APRIL, 1979
BEN H. CARTER, CLERK
By: /s/ SALLIE A. MANUEL
Deputy Clerk

Magistrate's Report and Recommendation.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Michael Duane Culver, Plaintiff, vs. Ford Motor Credit Company, Defendant. Civil Action No. C77-666A.

Filed: June 28, 1978.

This Truth-in-Lending case is before the Magistrate on cross motions for summary judgment on the plaintiff's complaint that disclosures required by the Consumer Credit Protection Act (15 U.S.C. § 1601, *et seq.*) were not made as they should have been incident to the extension of consumer credit.

On August 30, 1976, the plaintiff purchased a new 1976 Mercury Capri from Greenbriar Lincoln-Mercury Sales. The transaction was financed, and contemporaneous with the signing of the loan papers the contract was assigned to the defendant. The plaintiff here contends that the defendant was a creditor within the meaning of the Act, and, therefore, it had an obligation to clearly and conspicuously identify itself as such on the disclosure sheet.

The defendant denies that it was a creditor but says instead that it was a subsequent assignee.

The answers to the plaintiff's interrogatories and the answers to his requests for admissions give the factual context for a decision on this motion. The form utilized by the dealer to consummate the loan transaction and to make the necessary disclosures shows in the left hand bottom corner that the contract is accepted by the seller and assigned immediately to Ford Motor Credit Company. No address is given for the credit company at this point and otherwise the defendant's name does not appear on the disclosure form. At the time the contract was signed the defendant paid the

dealer the unpaid balance of the cash price which was being financed. Prior to the consummation of the transaction there were communications between agents of the defendant and the dealership personnel regarding the plaintiff's credit, and the defendant had a credit application prior to the consummation of the transaction and had checked the credit worthiness of the plaintiff. Ford Motor Credit had an automotive finance plan arrangement with Greenbriar Lincoln-Mercury Sales which generally dealt with the financing of the purchase of motor vehicles by the customers of the dealer. Incident to that understanding, Ford Motor Credit paid $270.63 into the dealer's reserve when the credit arrangement was consummated. At the time that the plaintiff signed the loan he purchased life insurance and credit accident and health insurance, and the beneficiary of these policies was shown as Ford Motor Credit. The certificate of the title was obtained by the dealer showing Ford Motor Credit as the lien holder from the inception, and the defendant received this certificate of title directly from the Georgia Department of Motor Vehicles rather than from the dealer. The disclosure form and the other credit instruments utilized in this transaction were prepared by Ford Motor Credit and supplied by them to the dealer. Although the defendant contends that it did not specifically direct the filling out of the form, it admits that it makes recommendations concerning what procedures ought to be followed in filling in the form and states that if they are not followed to the satisfaction of the defendant they simply will not accept the paper from the dealer.

While application of state law on these facts may permit a characterization of the relationship between the dealer [sic] as that of assignor-assignee, in the contemplation of the Truth-in-Lending Act the relationship was that of arranger and extender of credit. On very similar facts the Fifth Circuit

has thus characterized this relationship. *See Meyers v. Clearview Dodge,* 539 F. 2d 511 (5th Cir. 1976), *cert. denied sub nom, Meyers v. Chrysler Credit Corp.*, 431 U.S. 929 (1977). Consequently, Ford is a joint creditor who had an obligation to disclose its identity as such and to disclose that identity clearly and conspicuously and disclose not only its name but also its address. *See Copeland v. Harry White Ford,* C75-541A, and *Whitehead v. Harry White Ford,* C75-695A (N.D.Ga. 1977) (Henderson, J., and Freeman, J.). *See also* Magistrate's Report and Recommendation in the case of *Clark v. Ford Motor Credit Co.*, C77-761A.

CONCLUSION.

For the reasons stated, the plaintiff's motion for summary judgment ought to be granted, and he ought to recover a statutory penalty of $1,000.00 plus costs and reasonable attorney's fees. The attorney for the plaintiff is Directed to file a claim for these attorney's fees with supporting itemization and affidavit within ten (10) days of the receipt of any Order by the District Court favorable to the plaintiff.

SO REPORTED AND RECOMMENDED this 23rd day of June, 1978.

/s/ J. OWEN FORRESTER,
J. Owen Forrester
United States Magistrate

Magistrate's Report and Recommendation.

In the United States District Court for the Northern District of Georgia, Atlanta Division

Dennis Vissichelli, Plaintiff, vs. Terry Ford Company and Ford Motor Credit Company, Defendants. Civil Action No. C76-1766A.

Filed: June 26, 1978.

This action is now before the Court on motions for summary judgment submitted by both the plaintiff and defendants concerning plaintiff's complaint brought pursuant to the Federal Truth-in-Lending Act, 15 U.S.C. §1601, *et seq.* Plaintiff alleges that defendants have violated the Act in several particulars. Defendants have filed briefs in opposition to plaintiff's motion.

TRUTH-IN-LENDING VIOLATIONS.

The most apparent of the alleged Truth-in-Lending violations deals with the status of Ford Motor Credit Corporation (hereinafter referred to as FMCC), in the underlying installment credit sales transaction. It is plaintiff's position that FMCC is a creditor within the meaning of Regulation Z, whose identity and location should have been disclosed prior to the consummation of the contract. Regulation Z, 12 C.F.R. §226.2(s); §226.6(d); *Wellmaker v. W. T. Grant Co.*, 365 F.Supp. 531 (N.D. Ga. 1972). A line of cases has described this argument as the "conduit theory", whereby a financial institution, such as FMCC, has been held to be a co-creditor when the dealer acts simply as a conduit for placing a finance company's contracts with consumers and then regularly assigns the executed contracts to the financial institution. *Meyers v. Clearview Dodge Sales, Inc.*, 384 F.Supp. 722 (N.D. Ga. 1974), aff'd 539 F.2d 511 (5th Cir. 1976); *Philbeck v. Timmers Chevrolet, Inc.*, 361 F.Supp.

1255 (N.D. Ga. 1973), rev'd on other grounds, 499 F.2d 971 (5th Cir. 1974). Additional evidence indicating a credit extender-arranger relationship between two parties includes: the use by the dealer-arranger of the extender's financial loan papers; the arranging of an assignment of commercial paper to the extender prior to or contemporenously [sic] with the execution of the contract between the consumer and the arranger of credit; and the fact that the dealer does not ordinarily finance credit sales itself, but through its regular course of business submits financial statements to institutional creditors with whom it regularly deals for approval of the consumer's credit. Where an ongoing business relationship exists between the parties extending the credit, Regulation Z, 12 C.F.R. §226.8(a) and case law requires that both the arranger and extender be disclosed as creditors. In the case of multiple creditors, both parties will be held liable for any violation of the Truth-in-Lending Act and accompanying regulations. *Meyers, supra.*

In the instant transaction, defendant, FMCC, has asserted that it was not a creditor but simply a subsequent assignee of the retail sales contract executed by co-defendant and plaintiff. The record, however, would tend to indicate otherwise. Terry Ford Co., in its answer to plaintiff's interrogatories, has stated that it does not regularly finance automobile sales on its own. The only company listed by Terry Ford as a source of financing is co-defendant, FMCC. Contracts used by Terry Ford are prepared by FMCC and executed in accordance to the guidelines published by FMCC in manuals distributed to dealers, such as co-defendant. Further proof of the symbiotic relationship is the statement by Terry Ford that it had received acceptance of plaintiff's financial application from FMCC prior to the consummation of the contract. And finally, Terry Ford, avers that it would not have completed the transaction, had FMCC refused to

accept the assignment of the note securing the automobile sold to plaintiff. In light of this evidence establishing the ongoing arranger-extender relationship of the parties, FMCC should be considered to be a "creditor" within the definition of the Act. The improper disclosure of FMCC as an assignee rather than a co-creditor of this contract constitutes a violation of the Act for which FMCC and Terry Ford Company should be held liable.

Plaintiff has asserted other instances where defendants should be found to have failed to comply with the Act and Regulation Z. However, since there may be only one recovery per single consumer credit sale, regardless of the number of violations present in that transaction, 15 U.S.C. §1640(g); *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296 (5th Cir. 1976),[1] and the failure to disclose FMCC, the extender of credit, as the creditor, is a clear violation of the requirements of the Act, there is no need to proceed with a discussion of the remaining issues presented by plaintiff at this time.

CONCLUSION

For the reasons stated above, the plaintiff should have judgment on the Truth-in-Lending violation. Plaintiff is thus entitled to recover the statutory penalty of twice the finance charge, in this case the maximum, of $1,000. Additionally, the plaintiff is entitled to costs and reasonable attorney fees. In the event that this Report and Recommendation is adopted as the Opinion and Order of the District Court, the attorney for the plaintiff is directed to file with this Magistrate within ten (10) days of the receipt of the Order of the District Court, his claim and affidavit of attorney fees. The de-

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[1]The sole exception allowing multiple recovery where there is the continuing failure to disclose after recovery has been granted is not applicable to the present transaction

fendant shall be allowed ten (10) days from the receipt of the claim in which to object.

SO REPORTED AND RECOMMENDED this 23rd day of June, 1978.

/s/ JOHN E. DOUGHERTY,
John E. Dougherty
United States Magistrate

Order.

United States District Court, Northern District of Georgia, Atlanta Division.

Dennis Vissichelli vs. Terry Ford Company and Ford Motor Credit Company. Civil Action No. C76-1766A.

Filed: Oct. 26, 1978.

This truth-in-lending action is before the court on the magistrate's report and recommendation that plaintiff's motion for summary judgment on the main claim be granted and that defendants' similar motion be denied. A $1,000 penalty to be assessed against defendants is also recommended.

After having read and considered the report, the court hereby ADOPTS the same as its order and opinion and GRANTS plaintiff's motion for summary judgment, DENIES defendants', and AWARDS plaintiff a $1,000 penalty. Defendants' citations of authority outside the Fifth Circuit are of no effect in this court in the face of *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511 (5th Cir. 1976), *cert. denied* 431 U.S. 929 (1977). *See also Cenance v. Bohn Ford, Inc.*, 430 F.Supp. 1064, 1068-69 (E.D. La. 1977). The case is REMANDED to the magistrate for such further proceedings as are necessary.

So ORDERED, this 25th day of October, 1978.

/s/ NEWELL EDENFIELD,
Newell Edenfield
United States District Judge

Judgment.

United States District Court for the Northern District of Georgia-Atlanta Division.

Dennis Vissichelli vs. Terry Ford Company and Ford Motor Credit Company. Civil Action File No. C76-1766A.

Filed: Apr. 11, 1979.

This action came on for consideration before the Court, Honorable Newell Edenfield, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, adopting the Magistrate's Report and Recommendation.

It is Ordered and Adjudged that the Plaintiff DENNIS VISSICHELLI recover of the Defendants TERRY FORD COMPANY and FORD MOTOR CREDIT COMPANY the sum of ONE THOUSAND dollars ($1,000.00), SIX HUNDRED FIFTY-FIVE dollars ($655.00) attorney's fees, and cost of this action.

Dated at Atlanta, Georgia, this 11th day of April, 1979.

Ben H. Carter
Clerk of Court
By /s/ CATHY CHITWOOD
Deputy Clerk

FILED AND ENTERED IN CLERK'S OFFICE
THIS 11th DAY OF APRIL, 1979.
BEN H. CATER, [sic] CLERK
By /s/ CATHY CHITWOOD
Deputy Clerk

United States Magistrate's
Report and Recommendation.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Thomas J. Rogers, and Phyllis Rogers, Plaintiffs, vs. Frank Jackson Lincoln-Mercury and Ford Motor Credit Company, Defendants. Civil Action No. 77-39.

This action is now before the Court on motions for summary judgment submitted by both the plaintiffs and defendants concerning plaintiffs' complaint brought pursuant to the Federal Truth-in-Lending Act, 15 U.S.C. §1601, *et. seq*. Plaintiffs allege that defendants have violated the Act in several particulars. Defendants have filed a brief along with supporting affidavits in opposition to plaintiffs' motion.

TRUTH-IN-LENDING VIOLATIONS.

The first and most apparent of the alleged Truth-in-Lending violations deals with the disclosed status of Ford Motor Credit Corporation (hereinafter sometimes referred to as FMCC) in the underlying credit sales transaction. It is plaintiffs' contention that FMCC is a creditor within the meaning of Regulation Z, whose identity and location should have been disclosed to them prior to the consummation of the contract. Regulation Z, 12 C.F.R. §226.2(s); §226.6(d). A line of cases has described plaintiffs' proposition as the "conduit theory", whereby, a finance company, such as, FMCC, has been held to be a co-creditor when the seller acts simply as a conduit for placing the finance company's contracts with consumers and then regularly assigns the contracts to the finance institution. *Meyers v. Clearview Dodge Sales, Inc.*, 384 F.Supp. 722 (N.D. Ga. 1974); aff'd, 539 F.2d 511 (5th Cir. 1976); *Philbeck v. Timmers Chevrolet, Inc.*, 361 F.Supp 1255 (N.D. Ga. 1973); rev'd on

other grounds, 499 F.2d 971 (5th Cir. 1974); *Starks v. Orleans Motors,* 372 F.Supp 928 (E.D. La.), aff'd, 500 F.2d 1182 (5th Cir. 1974); *Garza v. Chicago Health Clubs, Inc.*, 347 F.Supp 955 (N.D. Ill. 1972). Additional evidence such as the execution of installment sales contracts by the seller, on forms prepared by the finance company, according to advice given to the seller by the finance company, will serve as further documentation of the interrelationship of the finance company as the extender and the retail seller as the arranger of the credit. *Meyers, supra; Philbeck, supra.* Where an on going business relationship exists between the parties extending the credit, Regulation Z, 12 C.F.R. §226.8(a) and case law requires that both the arranger and extender be disclosed as creditors.

In the instant transaction, defendant, FMCC, has asserted that it was not a creditor but simply a subsequent assignee of the retail sales contract executed by co-defendant and plaintiffs. The record, however, would tend to indicate otherwise. In response to plaintiffs' request for admissions, both defendants admitted that FMCC prepared the forms and contracts Frank Jackson Lincoln-Mercury used in its regular course of business. Over fifty percent of all the contracts executed by the dealer subject to the Act were assigned to FMCC pursuant to either a written or oral agreement between the two parties. Further evidence revealed that seller received advice from its co-defendant regarding the proper procedure to follow in completing these contracts. In light of this evidence establishing the ongoing arranger-extender relationship of the parties, FMCC should be considered to be a "creditor" within the definition of the Act. The improper disclosure of FMCC as an assignee rather than a co-creditor of this contract constitutes a violation of the Act for which FMCC should be held liable.

The above determination that defendant—FMCC—was not properly identified establishes a violation of the Truth-in-Lending Act for which co-defendant, Frank Jackson Lincoln-Mercury is also liable. It is patently clear that Frank Jackson is a creditor under the definition contained in Regulation Z. Defendant initially extended credit to the plaintiffs as is evidenced by the subsequent assignment of the contract to FMCC. Additionally, by regularly arranging for such assignments to FMCC and other lenders, it is in actuality arranging for the extension of credit which it did for plaintiffs. The failure to disclose the identity of all creditors as required by Reg. Z, 226.6(d) is a violation for which all creditors are liable. *Meyers, supra.*

Plaintiffs have asserted five other instances where defendants should be found to have failed to comply with the Act and Regulation Z. However, since there may be only one recovery per single consumer credit sale, regardless of the number of violations present in that transaction, 15 U.S.C. §1640(g), *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296 (5th Cir. 1976), and the failure to disclose FMCC, the extender of credit, as a creditor is a clear violation of the requirements of the Act, there is no need to proceed with a discussion of the remaining issues presented by plaintiffs at this time.

CONCLUSION.

For the reasons set forth above, each plaintiff should have judgment on the Truth-in-Lending violation and each is entitled to recover the maximum statutory penalty of $1,000. *Davis v. United States Mortgage and Investment of Gretna, Inc.*, 551 F.2d 971 (5th Cir. 1977). Additionally, the plaintiffs are entitled to reasonable attorney fees. In the event this report and recommendation is adopted as the Opinion and Order of the District Court, the attorney for the plaintiffs

is directed to file with this Magistrate within ten (10) days of the receipt of the Order of the District Court his claim and affidavit for attorney fees. Defendant shall be allowed ten (10) days from receipt of the claim in which to object.

SO REPORTED AND RECOMMENDED this 19th day of June, 1978.

/s/ JOHN E. DOUGHERTY,
John E. Dougherty
United States Magistrate

Order.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Thomas J. Rogers and Phyllis Rogers, Plaintiffs, vs. Frank Jackson Lincoln-Mercury and Ford Motor Credit Company, Defendants. Civil Action No. 77-39.

Let a copy of this Report and Recommendation be served upon counsel for the parties. Counsel for the parties will be allowed ten days from the receipt of this Report and Recommendation to file objections thereto. If no objections are made, this Report and Recommendation will be adopted as a record of the proceedings and may become the opinion and Order of the Court.

The Clerk is directed to submit the Report and Recommendation with objections, if any, on June 29, 1978.

SO ORDERED this 19th day of June, 1978.

/s/ JOHN E. DOUGHERTY,
John E. Dougherty
United States Magistrate

Order.

United States District Court, Northern District of Georgia, Atlanta Division.

Thomas J. Rogers and Phyllis Rogers, Plaintiffs, v. Frank Jackson Lincoln-Mercury and Ford Motor Credit Company, Defendants. Civil Action File Number C77-39A.

Filed: Oct. 2, 1978.

On March 30, 1976, Mr. and Mrs. Rogers, plaintiffs, executed a retail installment contract in connection with their purchase of a new 1976 Lincoln Continental from defendant, Frank Jackson Lincoln-Mercury (the "Dealer"). The Dealer simultaneously accepted the contract and assigned it to defendant Ford Motor Credit Company ("FMCC"). The Rogers have alleged various violations of the Consumer Credit Protection Act, 15 U.S.C. §1601 et seq. ("the Act") in connection with this transaction, for which violations it is alleged that both defendants are liable. Jurisdiction is invoked under 15 U.S.C. §1640(e).

Presently before the Court are cross-motions for summary judgment between the plaintiffs and each of the defendants. Although the plaintiffs have alleged multiple violations, the Court will address itself only to the plaintiffs' claim that defendant FMCC was a "creditor" as defined in Regulation Z, 12 C.F.R. §226.2(s) and as such was not clearly identified in the manner required by Regulation Z, 12 C.F.R. §226.6(d).

With respect to this particular alleged violation, there is no genuine issue as to any material fact. Thus, disposition of these motions depends on whether any of the parties are entitled to a judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. The resolution of two issues will determine that entitlement. First, was FMCC a "creditor" as that term is defined in Regulation Z, 12 C.F.R. §226.2(s);

and second, if so, was the designation of FMCC as assignee which appeared on the face of the retail installment contract sufficient disclosure clearly to identify FMCC as a "creditor" in accord with Regulation Z, 12 C.F.R. §226.6(d)?

I

The Rogers contend that FMCC is a "creditor" within the meaning of Regulation Z.[1] In support of their contention, the Rogers point to a line of cases establishing the "conduit theory", whereby a financial company, such as FMCC, has been held to be a co-creditor when a seller, such as the Dealer, acts simply as a conduit for placing the finance company's contracts with consumers and then regularly assigns the contracts to the finance company. *Meyers v. Clearview Dodge Sales, Inc.*, 384 F. Supp. 722 (N.D. Ga. 1974), *aff'd*, 539 F.2d 511 (5th Cir. 1976); *Philbeck v. Timmers Chevrolet, Inc.*, 361 F. Supp. 1255 (N.D. Ga. 1973), *rev'd* on other grounds, 499 F.2d 971 (5th Cir. 1974); *Starks v. Orleans Motors*, 372 F. Supp. 928 (E.D. La. 1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1974). Under this theory, evidence that the seller (dealer) executes installment sales contracts on forms prepared by the finance company according to advice given to the seller (dealer) by the finance company serves further to document that the finance company and the seller (dealer) are the extender and arranger of the credit, respectively. *Meyers, supra; Philbeck, supra.*[2]

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[1]Regulation Z defines "creditor" in pertinent part to mean

> a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit, which is payable by agreement in more than four installments, or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.

12 C.F.R. §226.2(s).

[2]Where there is a credit arranger there must obviously be a credit extender, and both are original creditors under the act [Consumer Credit Protection Act] and Regulation Z. Meyers, 539 F.2d at 515.

In the instant action, both defendants have asserted that FMCC was not a "creditor" but a "subsequent assignee".[3] However, in response to plaintiffs' request for admissions, both defendants admitted that FMCC prepared the forms and contracts the Dealer used when the purchase of motor vehicles was to be financed through FMCC; that FMCC finances more than fifty percent of all vehicles sold by the Dealer subject to the Act; and that there is an oral or written agreement between the Dealer and FMCC for the financing of the purchase of motor vehicles by customers of the Dealer. Further, FMCC admits that it provides the Dealer with recommendations on the manner in which the automobile retail installment contracts should be completed.[4] Based on the above admissions by the defendants, the Court finds that the Dealer acted as a conduit for FMCC, and that in the ordinary course of business, the Dealer regularly arranged and FMCC regularly extended credit to the Dealer's customers. Accordingly, FMCC is held to be a "creditor" here within the definition of Regulation Z, 12 C.F.R. §226.2(s).

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[3]This term is not defined either by the Act or Regulation Z. The installment contract in this transaction was accepted and assigned simultaneously with one signature. Given the ordinary usage of the words, the Court fails to see how the defendants logically can argue that FMCC was a "subsequent assignee".

Even if FMCC were a subsequent assignee, this alone would not preclude the Court's finding it to be a "creditor" under the Act and Regulation Z. The terms "subsequent assignee" and "creditor" are not mutually exclusive. *See*, Meyers v. Clearview Dodge Sales, Inc. 384 F. Supp. 722 (N.D. Ga. 1974), *aff'd*, 539 F.2d 511 (5th Cir. 1976).

[4]The Dealer, on the other hand, admits plaintiffs' request on this point, which request reads as follows:

> "7. That Ford Motor Credit Company provides instructions to Frank Jackson Lincoln-Mercury for the completion of Automobile Retail Installment Contracts; such instructions are required to be followed by Frank Jackson Lincoln-Mercury."

There is further basis for holding that FMCC was a "creditor" here. Without resort to the "conduit theory", the terms of the retail installment contract establish FMCC as a "creditor" within the definition of Regulation Z, 12 C.F.R. §226.2(s).

The Dealer's signature simultaneously accepted the contract and assigned it to FMCC making FMCC the Rogers' creditor, in the ordinary sense of the word. Since FMCC became the Rogers' creditor at the instant the transaction was consummated, the Court finds that FMCC extended "consumer credit"[5] in this transaction.[6] In its objections to the Magistrate's Report and Recommendation, FMCC's attorney refers the Court to a number of other decisions with this "same contract". On this basis[7] the Court finds that FMCC, in its ordinary course of business, regularly extends consumer credit and therefore holds that FMCC was a "creditor" for purposes of Regulation Z, 12 C.F.R. §226.2(s).

II

Regulation Z requires that where there are multiple "creditors" in a transaction, each "creditor" must be "clearly identified". 12 C.F.R. §226.6(d). Defendants are correct in their assertion that Regulation Z does not compel the use

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[5]"Consumer credit" means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household or agricultural purposes. 12 C.F.R. §226.2(p).

[6]This finding is butressed by the defendants' admissions that FMCC received plaintiffs' credit application from the Dealer prior to or contemporaneously with the receipt of the contract.

[7]*See* Munoz v. Int'l Alliance of Theatre Stage Employees and Moving Pictures Machine Operators of the United States and Can., 563 F.2d 205, 214 (5th Cir. 1977) (cases cited).

of the word ''creditor'' in their disclosure.[8] If the disclosure clearly communicates that the entity identified is a ''creditor'', the regulation is met.

The retail installment contract involved in this action contains, on its face, an assignment clause immediately to the left of the Rogers' signatures which designates FMCC as assignee and refers to the terms of the assignment set forth on the back of the contract.[9] The defendants contend that their designation of FMCC as the assignee of the contract sufficiently identifies FMCC as a ''creditor''.

The question arises whether the ''disclosure'' comprises only the assignment clause which appears on the face of the contract or whether it includes the terms of assignment on the back of the contract to which the assignment clause refers. However, it is unnecessary to answer this question. In either case the disclosure is insufficient.

In the first instance, the assignment clause considered alone does not clearly communicate that FMCC is a ''creditor''. It is not the case that all assignees are creditors. Thus it cannot be said that the designation of FMCC as assignee clearly identifies FMCC as a ''creditor''. In the second instance, if the terms of assignment set out on the back of the contract are included in the ''disclosure'', the defendants have failed to meet Regulation Z's requirement that all disclosures ''be made together on either: (1) The note or other

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[8]However, this would undoubtedly be the clearest form of identification.

[9]The clause itself is not captioned or set apart by bold-face. In fact, it is in smaller type than any of the surrounding print. Even if this were found to be a sufficient disclosure in every other respect, it could not be said as a matter of law that this disclosure was clear and conspicuous as required by the Act, 15 U.S.C. §1631(a), and Regulation Z, 12 C.F.R. §226.6(a). *See generally* Andrucci v. Gimbel Brothers, Inc., 365 F. Supp. 1240 (W.D. Pa. 1973), *aff'd*, 505 F.2d 729 (3d Cir. 1974).

instrument evidencing the obligation on the same side of the page and above the place for the customer's signature;[10] or (2) One side of a separate statement which identifies the transaction." 12 C.F.R. §226.8(a). Furthermore, it has been held that a "creditor's address which is lacking here, is a necessary disclosure for compliance with Regulation Z, 12 C.F.R. §226.8(a). *Welmaker v. W.T. Grant Company,* 365 F. Supp. 531 (N.D. Ga. 1972). The Court holds that defendants have not in this instance "clearly identified" FMCC as a "creditor" in the manner required by Regulation Z, 12 C.F.R. §226.8(a).[11]

III

Since the Court holds that FMCC was a "creditor" and as such was not clearly identified in the manner required by Regulation Z, it is not necessary to deal with the other violations alleged by the plaintiffs. *Mourning v. Family Publications Service,* 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973); *McGowan v. King, Inc.* 569 F.2d 845 (5th Cir. 1978). Plaintiffs have established their entitlement to judgment as a matter of law.

Accordingly, plaintiff's motion for summary judgment is GRANTED, defendant Ford Motor Credit Company's motion for summary judgment is DENIED, and defendant Frank Jackson Lincoln Mercury's motion for summary judgment is DENIED. Each plaintiff is awarded the maximum statutory penalty of $1,000.00, *Davis v. United States Mort-*

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[10]Nor is the Federal Reserve Board's interpretation, 12 C.F.R. §226.801, of any assistance to the defendants here.

[11]On the basis of this holding, it is unnecessary to reach the issue of whether the assignment clause taken together with the terms of assignment would clearly communicate that FMCC was a "creditor". Thus, no affirmative standard for the Court's "clear communication" test is established.

gage and Investment of Gretna, Inc., 551 F.2d 971 (5th Cir. 1977), plus costs and reasonable attorney's fees.

SO ORDERED, this the 27th day of September, 1978.

/s/ HAROLD L. MURPHY,
United States District Judge

Judgment.

United States District Court for the Northern District of Georgia, Atlanta Division.

Thomas J. Rogers and Phyllis Rogers vs. Frank Jackson Lincoln-Mercury and Ford Motor Credit Company. Civil Action File No. C77-39-A.

Filed: January 29, 1979.

This action came on for consideration before the Court, Honorable HAROLD L. MURPHY, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that each plaintiff, THOMAS J. ROGERS and PHYLLIS ROGERS recover of the defendants FRANK JACKSON LINCOLN-MERCURY and FORD MOTOR CREDIT COMPANY statutory penalty of ONE THOUSAND ($1,000.00) DOLLARS and that they recover jointly attorney's fees in the amount of NINE HUNDRED ($900.00) DOLLARS, plus interest as provided by law and costs of action.

Dated at Atlanta, Georgia, this 29th day of January, 1979.

BEN H. CARTER
Clerk of Court
By /s/ [Illegible]
Deputy Clerk

Filed and Entered in Clerk's Office
this 29th day of January, 1979
BEN H. CARTER, CLERK
By /s/ [Illegible]
Deputy Clerk

APPENDIX C.

Statutory Provisions and Regulations Involved.

15 U.S.C. § 1602(e)

"The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."

15 U.S.C. § 1602(f)

"Creditor refers only to creditors who regularly extend, or arrange for the extension of credit."

15 U.S.C. § 1614

"Except as otherwise specifically provided in this title, any civil action for a violation of this title which may be brought against the original creditor in any credit transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the alleged liability arose is apparent on the face of the instrument assigned unless the assignment is involuntary."

15 U.S.C. § 1631(a)

"Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended, the information required under this part or part D of this subchapter."

15 U.S.C. § 1641

"Except as provided in section 125(c) and except in the case of actions brought under section 130(d), in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this title shall be conclusive proof of the delivery thereof and, unless the violation is apparent

on the face of the statement, of compliance with this chapter. This section does not affect the rights of the obligor in any action against the original creditor.''

Regulation Z, 12 C.F.R. § 226.2(q)

'' 'Credit' means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. (See also paragraph (jj) of this section.)''

Regulation Z, 12 C.F.R. § 226.2(s)

'' 'Creditor' means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit, which is payable by agreement in more than four instalments, or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise. For purposes of the requirements of §§ 226.7(a)(6), (7), (8), and (9); 226.7(b)(1)(i), (ii), (iii), (ix), and (x); 226.7(b)(2); 226.7(c), (d), (f), (g), (h), and (i); 226.13; and 226.14, the term 'creditor' shall also include card issuers, whether or not the payment of a finance charge is or may be required. For purposes of the requirements of §§ 226.4(i) and 226.13(k) the term 'creditor' shall include any person who honors a credit card.''

Regulation Z, 12 C.F.R. § 226.6(d)

''If there is more than one creditor or lessor in a transaction, each creditor or lessor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer or lessee. If two or more creditors or lessors make a joint disclosure, each creditor or lessor shall be clearly identified. The disclosures required under

paragraphs (b) and (c) of 226.8 shall be made by the seller if he extends or arranges for the extension of credit. Otherwise disclosures shall be made as required under paragraphs (b) and (c) of § 226.8 or paragraph (b) of § 226.15."

Regulation Z, 12 C.F.R. § 226.8(a)

"Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as otherwise provided in this section, such disclosures shall be made before the transaction is consummated. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified. All of the disclosures shall be made together on either:

(1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature; or

(2) One side of a separate statement which identifies the transaction. Notwithstanding the provisions of paragraphs (1) and (2) of this subsection, a creditor may, in any transaction in which the payments scheduled to repay the indebtedness vary, satisfy the requirements of § 226.8(b)(3) with respect to the number, amount, and due dates or periods of payments by disclosing the required information on the reverse of the disclosure statement or on a separate page(s), provided that the following notice appears with the other required disclosures: 'NOTICE: See [reverse side] [accompanying statement] for the schedule of payments.' "

APPENDIX D.

Legislative History of the Truth in Lending Act and the Truth in Lending Simplification and Reform Act Relating to Installment Sales Financing and the Creditor Issue.

A review of the legislative history of those portions of the Truth in Lending Act and the Truth in Lending Simplification and Reform Act dealing with the liability of assignees confirms without any doubt that Congress did not intend assignees in typical installment sales financing transactions to be "creditors" within the meaning of the Act.

1. Legislative History of the Truth in Lending Act.

Despite the fact that installment sales financing transactions were in widespread use and formed a major part of the booming consumer credit industry during the 1960's, the original version of the proposed Truth in Lending Act, Senate Bill 5, 90th Cong., 1st Sess. (1967), did not address the question of assignee liability. The bill clearly imposed liability on "creditors," but nowhere did the bill either provide for or limit the liability of an assignee. *See* S.5 § 7(a).

On June 5, 1967, approximately six months after the bill was first introduced, S.5 was amended in committee to add a new Section 4(e) that was specifically intended to limit the exposure of assignees. 113 Cong. Rec. 14691, 14693 (June 5, 1967). The new Section read as follows:

> "Written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this section shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this section in any action or proceeding by or against an assignee of the original creditor without knowledge to the contrary

> by such assignee when he acquires the obligation. Such acknowledgment shall not affect the rights of the obligor in any action against the original creditor.''

As explained by the Senate Committee on Banking and Currency, Section 4(e) was:

> ''designed to facilitate the free flow of credit paper. It provides a bank or finance company with assurance that the original dealer has made the required disclosure *and that the bank or finance company will not be liable for any failure, on the dealer's part, to make disclosure*.'' ''Explanation of Changes in Committee Print,'' 113 Cong. Rec. 14694, 14695 (June 5, 1967) (emphasis added).

This interpretation was adopted verbatim in both the Senate Report on S.5 and the House Report on H.R. 11601, 90th Cong., 1st Sess. (1967) (the original House version of the Truth in Lending Act). *See* S. Rep. No. 392, 90th Cong., 1st Sess. 18 (1967); H.R. Rep. No. 1040, 90th Cong., 1st Sess. (1967), *reprinted in* [1968] *U.S. Code Cong. & Ad. News* 1962, 1984. That this new provision was intended to apply to assignees in typical sales finance transactions is evidenced not only by the stated purpose of the Section of giving assurances to the banks and finance companies who normally were involved in those transactions, but also by the ample evidence presented to a subcommittee of the Committee which proposed the new Section of the magnitude and practices of sales finance companies in general. *See Hearings on S.5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 317, 334-35, 412-13, 456, 473-74, 698 (1967). Not surprisingly, the Section appears to have been suggested by the credit industry itself. *See* 113 Cong. Rec. 14691 (June 5, 1967).

Significantly, the amendment to the bill did not by its terms impose any liability whatsoever on assignees. Instead, the bill merely limited whatever liability might have otherwise existed. Although no provision of the bill directly exposed assignees to liability, the gradual erosion of the holder-in-due-course doctrine appears to have given rise to concern that, in the absence of a provision limiting the liability of assignees, assignees would be subject to all Truth in Lending claims and defenses that could have been asserted against the assignor. As amended, S.5 passed the Senate on July 11, 1967. 113 Cong. Rec. 18424 (July 11, 1967).

Section 4(e) was incorporated verbatim into Section 203(e) of the original House Truth in Lending bill first introduced on July 20, 1967. H.R. 11601, 90th Cong., 1st Sess. (1967). On the eve of the passage of the House bill, Section 203(e) was amended to specifically provide that the provisions of the Section limiting the liability of assignees would not apply to assignees "in a continuing business relationship with the original creditor." 114 Cong. Rec. 1611 (Jan. 31, 1968). This amendment was clearly broad enough to cover assignees in most routine sales finance transactions. As thus amended, and as finally passed by the House of Representatives by a vote of 383 to 4 [114 Cong. Rec. 1852 (Feb. 1, 1968)], Section 203(e) read as follows:

> "Written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this section shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this section in any action or proceeding by or against an assignee of the original creditor without knowledge to the contrary by such assignee when he acquires the obligation, *unless the assignee, its subsidiaries, or affiliates, are in a continuing business relationship with the original*

> *creditor*. Such acknowledgment shall not affect the rights of the obligor in any action against the original creditor." (Emphasis added.)

At the same time, the bill was also amended to add a new subsection which specifically created liability on assignees who were "in a continuing business relationship with the original creditor" in any transaction involving a security interest in real property. *See* 114 Cong. Rec. 1611 (Jan. 31, 1968).

These amendments were offered by Representative Cahill because the bill only imposed responsibility upon the original creditor to the exclusion of assignees, including those "in a continuing business relationship with the original creditor." *See* 114 Cong. Rec. 1611 (Jan. 31, 1968). In the words of Senator Proxmire: "[T]he amendment increases the legal rights of consumers with respect to those who purchase mortgages from the original . . . [creditor]." 114 Cong. Rec. 5024 (March 4, 1968).

Importantly, the amendments show that the draftsmen of the bill themselves thought that Section 203(e), without these latest changes, would have shielded even those assignees who were intimately involved with the original creditor from liability. It is equally important to note that the legislators chose to specifically impose liability on assignees in real estate transactions. If assignees who were in a continuing relationship with the original creditor had been thought to be "creditors," then the provision specifically imposing liability on assignees in real estate transactions would have been unnecessary since the assignees already would have been liable as "creditors" under Section 206 of H.R. 11601 (the predecessor to Section 130(a) of the Act). This also shows that the draftsmen did not intend assignees in non-real estate transactions to have the same broad liability as "creditors."

Because of various differences between the House and Senate versions of the Truth in Lending Act, a joint Conference Committee was appointed by both legislative bodies to study the feasibility of a compromise bill. *See* 114 Cong. Rec. 2555 (Feb. 7, 1968); 114 Cong. Rec. 2736 (Feb. 8, 1968). After three months of intense negotiations and drafting, the Committee reported a substitute bill that quickly passed both houses and was enacted into law in May of 1968. 114 Cong. Rec. 15755 (June 3, 1968).

The Conference bill retained many of the important features that were contained in the House bill. For example, the section expressly imposing liability on assignees in real estate transactions was carried into Section 130(d) of the compromise bill without substantial change. *Compare* 15 U.S.C. § 1640(d) *with* H.R. 11601, 90th Cong., 1st Sess. § 203(e), *reprinted in* 114 Cong. Rec. 1610-11 (Jan. 31, 1968). *However, the provision of the House bill which excluded assignees who were "in a continuing business relationship with the original creditor" from the section that limited the liability of all other assignees to facial violations was deleted, except with reference to real estate transactions*. Thus, as adopted by the joint Conference Committee, and as finally enacted into law, Section 131 of the Act [15 U.S.C. § 1641] provided, as it still provides today, as follows:

> "Except as provided in section 125(c) and except in the case of actions brought under section 130(d) [imposing liability on assignees in real estate transactions], in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this title shall be conclusive proof of the delivery thereof and, unless the violation

is apparent on the face of the statement, of compliance with this chapter. This section does not affect the rights of the obligor in any action against the original creditor."

Two crucial points emerge from this legislative history of Section 131 of the Act. First, Congress chose to expressly impose liability on assignees only in real estate transactions. At no time did Congress ever specifically provide for assignee liability in other transactions. Second, Congress carefully opted to limit the liability of all assignees except those in real estate transactions, and specifically rejected the language first adopted by the House of Representatives that would have excluded from the provisions limiting assignee liability any assignee who was "in a continuing business relationship with the original creditor." These conclusions are particularly insightful in view of the fact that Congress was keenly aware of the staggering volume of installment sales financing handled each year by banks and finance companies and of the practices of those companies, yet made no effort to distinguish those companies from any other assignees who were "in a continuing business relationship with the original creditor." *See, e.g., Hearings on S.5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 317, 334-35, 412-13, 456, 473-74, 698 (1967). It is thus clear beyond any doubt that Congress did not intend to impose any liability under the Act on banks or sales finance companies, or any other assignees who were in a continuing business relationship with the original creditor, except in connection with real estate transactions under Section 130(d), and that Congress purposely limited any liability that could otherwise be asserted against banks or sales finance companies in non-real estate transactions in accordance with the provisions of Section 131. To conclude

that an assignee may additionally be liable as a "creditor" would be in direct conflict with the well-documented intent of Congress and is not supported by the language or any part of the legislative history of the Act.

Approximately four years after the Act became effective, and despite the clear legislative history of the Act, the district court in *Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972) held that assignees of consumer retail installment sales contracts "may themselves be 'creditors' within the meaning of, and subject to liability under, Truth in Lending," 347 F. Supp. at 964, if the assignees were found to have "extended" credit to the buyers through the "conduit" of the seller. This opinion did not analyze or even mention the legislative history discussed above. Since the violation in *Garza* was facial, the Court could have reached the same result without concluding that the assignee was a "creditor" by applying Section 131 and the basic tenets of the holder-in-due-course doctrine. It was thus unnecessary for the Court to find that the assignee was a "creditor."

After the decision in *Garza*, a few district court cases followed the "conduit theory," although none of the cases examined either the rationale of that theory or the legislative history of Section 131. *See Kriger v. European Health Spa, Inc.*, 363 F. Supp. 334 (E.D. Wis. 1973); *Philbeck v. Timmers Chevrolet, Inc.*, 361 F. Supp. 1255 (N.D. Ga. 1973), *rev'd on other grounds*, 499 F.2d 971 (5th Cir. 1974). *See also Starks v. Orleans Motors, Inc.*, 372 F. Supp. 928 (E.D. La.), *aff'd*, 500 F.2d 1182 (5th Cir. 1974).

The so-called "health club" or "conduit theory" cases arose at a time when the National Commission on Consumer Finance was considering whether, and to what extent, assignees should be liable for Truth in Lending violations. That organization was commissioned in 1968 as a part of

the original Truth in Lending Act to "study and appraise the functioning and structure of the consumer finance industry, as well as consumer credit transactions generally." Consumer Credit Protection Act, Pub. L. No. 90-321, § 404(a). In December of 1972, after four years of study, the Commission made the following recommendations:

> "*Liability of assignees*. The Commission considers whether a financing agency which buys consumer paper should be held equally liable with the original creditor for noncompliance with TIL when noncompliance is evident on the face of the disclosure statement. Such a requirement would tend to add another level of enforcement, because the bank or finance company would have an incentive to require compliance with TIL by dealers supplying installment paper.
>
> . . .
>
> To resolve these problems, *the Commission recommends, first, that the Truth in Lending Act be amended as necessary to assure that subsequent assignees are held equally liable with the original creditor when violations of the Truth in Lending Act are evident on the face of the credit agreement or disclosure statement*. Because assignees frequently provide nonconforming forms to their dealers, responsibility for violations may rest with them more than with their dealers. Presumably, assignees also check instalment agreements for compliance with various state laws. It should not be a great burden for them to make random verifications for TIL compliance. Surely, an assignee is (or should be) more aware of which of his dealers *need* close surveillance than an examiner from some supervisory agency." *Report of the National Commission on Consumer Finance, Consumer Credit in the United States* (Dec. 31, 1972) (hereinafter cited as "*NCCF Report*"), *reprinted in* Issue No. 215 CCH

> Consumer Credit Guide 190 (Jan. 15, 1973). (Emphasis in original.)

The Commission's recommendation that assignees only be held liable for facial violations is consistent with the goal of achieving greater compliance with the requirements of the Act. Assignees can help ensure compliance by supplying properly drafted forms to dealers and by carefully scrutinizing a contract before purchasing it to ensure that it contains no violations apparent on its face. On the other hand, imposition of liability for non-facial or other unknown violations would not serve any legitimate purpose, since the assignee would have no way of discovering them.

The Federal Reserve Board ("the Board") approved the Commission's recommendation. At page 25 of its 1973 Annual Report on Truth-in-Lending, the Board stated that:

> "While the present language is ambiguous, section 131 of the Act may already place such liability upon an assignee. This section could, however, stand clarification and the Board is inclined to support [the Commission's] recommendation."

In response to the recommendations of the Commission and the Board, Congress enacted Section 115 of the Act [15 U.S.C. § 1614] in 1974. That Section, which became effective on October 28, 1974 [*see* Pub. L. No. 93-495, § 408(e)], provides as follows:

> "Except as otherwise specifically provided in this title, any civil action for a violation of this title which may be brought against the original creditor in any credit transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the alleged liability arose is apparent on the face of the instrument assigned unless the assignment is involuntary."

The legislative history of Section 115 confirms that the Section was adopted on the basis of the Commission's report and recommendation. *See* S. Rep. No. 93-278, 93d Cong., 1st Sess. 13, 26 (1973) (this report accompanied S.2101, 93d Cong., 1st Sess. (1973), which contained the original version of the present Section 115).

The Commission's recommendation followed years of exhaustive study and was designed to take into account the Commission's recognition of the commercial realities inherent in the widespread use of installment sales financing. *See generally NCCF Report, supra,* at 8-13, 48, 60-61, 114-16 and 190 for documentation of the Commission's in-depth familiarity with the structure of this financing market. In view of the specific recommendations of the Commission, quoted in part above, it is clear that the Commission was concerned with financial institutions which maintained close relationships with dealers (such as those who "provide[d] . . . forms to their dealers") and who were in a position to police the policies and procedures of the dealers. This is precisely the same assignee found to be liable as a "creditor" under the conduit theory.

Had Congress intended to perpetuate the conduit theory, it could have easily done so by amending the definition of "creditor" to include assignees. Significantly, as a part of the same legislation that adopted Section 115 [Pub. L. No. 93-495], Congress enacted Section 702(e) of the Equal Credit Opportunity Act [15 U.S.C. § 1691a(e)], which defined "creditor" for the purpose of that Act as including "any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." Although the definition of "creditor" as contained in the Truth in Lending Act was also amended at the same time, Congress did not include "assignees" within that definition. *See* Pub. L. No. 93-495, § 303. Furthermore, if Congress had be-

lieved that assignees were also "creditors," then Section 115 would have been superfluous since assignees would already have been liable as "creditors." In short, the 1974 amendments evince a Congressional disregard, if not a total rejection, of the conduit theory. *See* Rohner, *Holder in Due Course in Consumer Transactions*, 60 Cornell L. Rev. 503, 560 (1975).

The foregoing legislative history illustrates clearly and convincingly that at all times prior to and since the enactment of the Act, Congress intended assignees to be treated differently than "creditors." Not one single piece of evidence indicates that Congress thought assignees could be "creditors," and in fact the evidence is overwhelmingly to the contrary.

2. Legislative History of the Truth in Lending Simplification and Reform Act.

On September 27, 1976, the United States Court of Appeals for the Fifth Circuit filed its decision in *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511 (5th Cir. 1976). In *Meyers,* the court held that the assignee of a consumer credit contract, Chrysler Credit Corporation, was subject to all duties and liabilities of a "creditor" under the Act.

The *Meyers* decision quickly sent waves of uncertainty and apprehension through financial institutions engaged in installment sales financing transactions throughout the United States. Representatives of the industry immediately began contacting the Federal Reserve Board asking for an administrative clarification of the civil liability exposure of assignees. In April of 1977, the National Consumer Finance Association filed a request with the Board for an Official Board Interpretation to resolve the inconsistency in the law generated by *Meyers*. On June 30, 1977, the Consumer Bankers Association submitted a formal memorandum to

the Board requesting amendments to Regulation Z that would make it clear that it was the party to whom a consumer credit contract was payable on its face that was responsible for making Truth in Lending disclosures and that a subsequent assignee's potential liability under the Act was defined *and* limited by Section 115. This request was supported by a memorandum of the American Bankers Association submitted to the Board on July 27, 1977.

The Board chose not to issue an Official Board Interpretation or amend Regulation Z. Instead, the Board chose to resolve the problem by urging that the Act be amended to clarify the status of assignees in installment sales financing transactions. On July 13, 1977, at the request of the Board, Senator Proxmire introduced Senate Bill 1846, a Truth in Lending simplification bill drafted by the Board. This bill, among many other changes to the language of the Act, contained the Board's attempt to clarify its view as to the appropriate treatment of assignees under the Act. This was accomplished by tightening the Act's definition of ''creditor'' in Section 104 of the bill as follows:

> ''(d) CREDITOR.—The transaction must involve a creditor. A 'creditor' is a person who regularly and in the ordinary course of business extends or arranges for the extensions of credit, or is a card issuer as defined in section 103(a)(6).
>
> ''(1) A person (including any seller) extends credit if the obligation, note, or other evidence of indebtedness is payable on its face to that person, or if there is no such evidence of indebtedness, if the debt is payable by agreement to that person.
>
> ''(2) A person arranges for the extension of credit if the extender of credit does not regularly and in the ordinary course of business extend credit and the person—

> "(A) receives or will receive a fee or other compensation specifically for arranging the credit; or
>
> "(B) has knowledge of the credit terms and participates in the preparation of contract documents required in connection with the credit transaction."

This language of the bill, as proposed by the Board, made it clear that purchasers of installment paper are not "creditors" and are to be treated solely as subsequent assignees whose liability is limited to disclosure errors that are apparent on the face of the disclosure statement.

The Senate sent S.1846, along with three other bills proposing amendments to the Act, to be considered by its Committee on Banking, Housing and Urban Affairs. On March 23, 1978, this Committee reported out Senate Bill 2802, which was termed the Truth in Lending Simplification and Reform Act. Senate Bill 2802 had slightly modified the definition of "creditor" from S.1846, but the earlier bill's exclusion of any party to whom the debt was not payable on its face remained. The definition in S.2802 read as follows:

> "The term 'creditor' refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required; and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the foregoing, a person who regularly arranges for the extension of consumer credit, which is payable in more

than four installments or for which the payment of a finance charge is or may be required, from persons who are not creditors is a creditor, and in the case of an open end credit plan involving a credit card the card issuer and any person who honors the credit card and offers a discount which is a finance charge are creditors.''

The Senate Committee Report on S.2802 was brief in commenting upon the bill's definition of ''creditor,'' stating only that:

> ''This section simplifies the definition of 'creditor' by specifying that it applies to a person who regularly extends credit and is the person to whom a debt is initially payable on its face. This will eliminate confusion under the current act as to the responsibilities of assignees and 'arrangers of credit.' This revision was recommended by the Federal Reserve Board.'' S. Rep. No. 95-720, 95th Cong., 2d Sess. 9 (1978).

Senate Bill 2802 also repealed Section 115 of the Act which defined and limited the liability of assignees. A slightly modified version of Section 131 was adopted by amending Section 131 as follows:

> ''§ 131. Liability of assignees
>
> ''(a) Except as otherwise specifically provided in this title, any civil action for a violation of this title or proceeding under section 108 which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, violations apparent on the face of the disclosure statement include, but are not limited to (1) disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other doc-

uments assigned, or (2) disclosure not made in the terminology required by this title.''

The Senate Committee Report on this change explained:

> ''Under present law, an assignee is generally liable only where a violation is 'apparent on the face' of the disclosure statement. What types of violations are covered is unclear. This section provides that violations are apparent on the face of a disclosure statement when disclosures are inaccurate or incomplete based on the statement or other documents involved, and where incorrect terminology is utilized.'' S. Rep. No. 95-720, 95th Cong., 2d Sess. 17 (1978).

The Senate passed S.2802 and sent it to the House for consideration. The House took no action on the bill and it died in that session. On January 23, 1979, Senator Proxmire reintroduced the text of S.2802 as Senate Bill 108 of the 96th Congress. Three months later, in support of the passage of S.108, Senator Proxmire introduced for report in the Congressional Record a number of remarks by Senator Garn, a member of the Senate Committee that reported S.2802 the previous year. These remarks included the following comment regarding the bill's definition of ''creditor:''

> ''The 'multiple creditor' problem, which first surfaced in *Meyers v. Clearview Dodge, Inc. and Chrysler Credit Corporation,* 384 F.Supp. 722 (E.D. La., 1974); affirmed 539 F.2d 511 (5th Cir., 1976), has been resolved by explicitly defining the creditor as the one to whom the note is payable and by requiring only one creditor to make disclosures.'' 125 Cong. Rec. 4990 (May 1, 1979).

On May 1, 1979, S.108 was passed by the Senate and sent on to the House. As S.2802 before it, S.108 received no attention from the House. In an effort to move this legislation along a bit more quickly, the Senate appended

the text of S.108 to the Depository Institutions Deregulation and Monetary Control Act of 1980 (H.R.4986) during its consideration of that bill on October 15, 1979. House Bill 4986 was eventually reported out of a joint congressional committee on March 21, 1980, and signed into law on March 31, 1980, as P.L.96-221. The text of S.108 was enacted as Title VI of P.L.96-221 with only minor changes (and no changes as might affect the definition of ''creditor'') from the text of S.2802 as reported by the Senate Committee two years earlier.

The amendment to the definition of ''creditor'' in the Truth in Lending Simplification and Reform Act (P.L. 96-221, Title VI) to exclude financial institutions purchasing installment paper in installment sales financing transactions was not intended to change their status or liability under the present Act. Rather, in the words of the Senate Committee reporting S.2802, it was intended solely to ''eliminate confusion under the current act'' as to whether such financial institutions should be deemed ''creditors'' for purposes of Truth in Lending. Both the Board and Congress agreed that, in view of recent court decisions concerning assignee liability under the Act, some clarification of the Act's intent was required. This clarification was provided through the amended definition of ''creditor'' in the new Act.

APPENDIX E.

United States District Court, Eastern District of Louisiana.

Sammie T. Clausell and Ethel L. Clausell Versus Abraham Lincoln-Mercury, Inc., and Credithrift of America Number 5, Inc. Civil Action No. 79-1139. Section "F".

Filed: July 22, 1980.

This matter was submitted to the Court for trial on the merits. The parties entered into a joint stipulation of facts and now, in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following conclusions of law.

CONCLUSIONS OF LAW.

I.

Credithrift of America No.5, Inc. in instant transaction was a creditor for the purposes of the Truth in Lending Act.[1]

II.

The failure to disclose Credithrift as a multiple creditor is a violation of the Truth in Lending Act and regulations promulgated thereunder.[2]

III.

The naming of Ford Motor Credit Company as an assignee on the disclosure form was misleading and confusing and therefore in violation of Regulation Z, 12 CFR 266.6(c).

---

[1]15 USC 1601 et seq.; Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (CA5-1976); Desselles v. Mossy Motors, Inc., 442 F.Supp. 897 (E.D.La.-1978); Cenance v. Bohn Ford, Inc., 430 F.Supp. 1064 (E.D.La.-1977).

[2]15 USC 1631(a); Regulation Z, 12 CFR 226.6(d); Meyers, supra, f.n.1.

IV.

The fact that Credithrift was a multiple creditor and that Ford Motor Credit Company was not the assignee in instant transaction was within Credithrift's knowledge and within the purview of its relationship with the plaintiffs herein.

V.

Assuming, arguendo, that the form letters and notices sent to plaintiff by Credithrift did alert the plaintiffs to the false information on the disclosure form and did adequately correct the disclosure errors, there is no evidence whatsoever to indicate that said forms and notices were mailed to the plaintiffs within fifteen days after discovering the error. Therefore Credithrift has failed to carry the burden of proving its compliance with 15 USC 1640(b).

VI.

The retention of the certificate of title by Credithrift is not a security interest within the meaning of the Truth in Lending Act and regulations thereunder.[3]

VII.

Pursuant to 15 USC 1640(a) each plaintiff is entitled to the statutory damage award in the amount of $1,000. together with attorney's fees and costs.[4] Since plaintiffs have already settled with Abraham Lincoln-Mercury, Inc., the total award in their favor against Credithrift will be $1,000. plus one half of the attorney's fees and costs.[5]

---

[3]J. Pierre Barbre v. Cumberland Capital Corporation, et al, No. 78-3401, U.S.D.C., Eastern District of Louisiana, 1979.

[4]Davis v. United Companies Mortgage and Investment of Gretna, Inc., 551 F.2d 971 (CA5-1977), rehearing and rehearing *en banc* denied, June 7, 1977. This Court distinguishes Owens v. Magee Finance Service of Bogalusa, Inc., 476 F.Supp. 758 (E.D.La.-1979), on the grounds that therein one party was not a co-maker of the subject note.

[5]Desselles, supra, f.n.1.

VIII.

Because the joint stipulation of fact did not deal with the question of reasonable attorney's fees and costs, this Court will refer these matters to the Magistrate as a special master for hearing and a report and recommendation. Thereafter final judgment will issue.

Dated at New Orleans, Louisiana, this 22nd day of July, 1980.

/s/ Lansing L. Mitchell
United States District Judge

APPENDIX F.
Subsidiaries of Ford Motor Company.

DOMESTIC AFFILIATES

Ford Credit — Canada Limited
Ford Motor Credit Company International
The American Road Insurance Company
Ford Life Insurance Company
Vista Insurance Company
Vista Life Insurance Company
American Road Services Company
American Road Equity Corporation
Ford Consumer Credit Company
Ford Motor Credit Company of Iowa
Ford Consumer Discount Company
Philco Finance Corporation
Canadian Road Credit Company, Limited
Ford Credit Equity Corporation
Ford Motor Company (Delaware)
Eveleth Taconite Company (Delaware)
Ford Products Company (Delaware)
Ford Communications, Inc. (Delaware)
Environ Inc. (Delaware)
Ohio Production Corporation (Delaware)
Predelivery Service Corporation (Delaware)
Ford Export Corporation (Delaware)
Ford Motor Land Development Corporation (Delaware)
Detroit Downtown Development Corporation (Delaware)
Ford Motor Properties, Inc. (Delaware)
Greenfield Properties, Inc. (Delaware)
Ghia, Inc. (Delaware)
Rise Services Incorporated (Delaware)
Dearborn Capital Corporation (Delaware)
Ford Leasing Development Company (Delaware)
Manhattan Ford, Lincoln-Mercury, Inc. (Delaware)

Ford Motor Dealership Facilities Company (Delaware)
Parklane Insurance Company (Michigan)
Ford Aerospace and Communications Corporation (Delaware)
Logistic Services Corporation (Delaware)
Aeronutronic Overseas Services, Inc. (Delaware)
Aeronutronic Services Corporation (Delaware)

FOREIGN AFFILIATES

Compania Financiera de Inversiones Y Credito S.A. (Argentina)
Ford Credit Australia, Limited
Ford Credit Australia Wholesale, Limited
Ford Credit N.V. (Belgium)
Ford Financiadora S.A. (Brazil)
Ford Distribuidora Ltd. (Brazil)
Ford Credit A.S. (Denmark)
Credit Ford S.A. (France)
Ford Credit Bank AG (Germany)
Henry Ford & Son (Finance) Limited (Ireland)
Ford Credit S.p.A. (Italy)
Ford Finance Company of Japan, Limited (Japan)
Ford Credit B.V. (Netherlands)
Ford Motor Credit Company of New Zealand, Ltd.
FCP Finance Corporation (Philippines)
FCP Credit Corporation (Philippines)
Ford Credit South Africa (Proprietary) Limited
Ford Credit S.A. (Spain)
For Leasing S.A. (Spain)
Ford Credit A.B. (Sweden)
Ford Credit S.A. (Switzerland)
Ford Motor Credit Company, Limited (United Kingdom)
Automotive Finance Limited (United Kingdom)
Ford Financial Trust Limited (U.K.)
Ford Motor Compania Comercial, S.A. de C.V. (Mexico)

Ford International Capital Corporation (Delaware)
Ford International Finance Corporation (Delaware)
Transcon Insurance Limited (Bermuda)
Ford Motor Company Caribbean, Inc. (Puerto Rico)
Fordson Coal Company (Delaware)
Ghia, S.p.A. (Italy)
Ford Latin America, S.A. de C.V. (Mexico)
Philco Corporation of Canada, Limited
Philco Radio E Televisao, Ltda (Brazil)
Philco Da Amazonia, Ltda (Brazil)
Philco Industria Brasileira de Semiconductores, Ltda. (Brazil)
Philco Gmbil (West Germany)
Dearborn Capital Corporation (Delaware)
Ford Motor Company of Canada, Limited
Ford Motor Company of Australia Limited
Ford Sales Company of Australia Limited
Ford Motor Company of New Zealand Limited
Ford Motor Company Private, Limited (Singapore)
Ford Motor Company of South Africa (Proprietary) Limited (South Africa)
Ensite Limited (Canada)
Essex Manufacturing (a Partnership) (Canada)
Mariveles Stamping Plant Branch (Philippines)
Ford Lio Ho Motor Company, Ltd. (Taiwan)
Ford Asia-Pacific, Inc. (Delaware)
Ford Philippines, Inc. (Philippines)
Ford Motor Company (Japan) Ltd. (Japan)
Ford Motor Company of Malaysia, Sdn. Bhd. (Malaysia)
Japan Automatic Transmission Company, Ltd. (Japan)
Ford Motor Argentina S.A. (Argentina)
Metalurgica Constitucion S.A. (Argentina)
Transax, S.A. Commercial Industrial Y Financiera (Argentina)

Plan Ovalo S.A. (Argentina)
Ford Motor Company S.A. (Mexico)
Ford Motor Company del Peru, S.A. (Peru)
Ford Motor Company del Venezuela (Venezuela)
Productos Industrailes, C.A. (Venezuela)
Ford Brasil, S.A. (Brazil)
Sao Francisco, Ltda Maquinas E Ferramentas (Brazil)
Bongotti S.A. Industria E. Comercio de Radiadores (Brazil)
Ford Administracao e Consorcios Ltda (Brazil)
Transglobal-Corretagem de Seguros, Ltda (Brazil)
Ford (Uruguay) S.A. (Uruguay)
Ford Mid-East and Africa, Incorporated (Delaware)
Ford Motor Company (Egypt) S.A.E., Alexandria (Egypt)
Ford Motor Company, Limited (England)
Ford Tractor (Belgium) Limited (Belgium)
Henry Ford & Son, Limited (Ireland)
Henry Ford and Son (Sales) Limited (Ireland)
Dagenham Motors Limited (England)
Ford Personal Import Export, Ltd. (England)
Ford-Werke AG (Germany)
Genk, Belgium Branch
Saar-Industrie, Gmbil (Germany)
Ford Verisicherungs Vermittlungs, Gmbil (Germany)
Ford Motor Company (Austria) K.G. (Austria)
Ford-Versorgungs-und-Unterstutzungseinrichtung-Gmbil (Germany)
Ford Investitions-Gmbil (Germany)
Ford Investitions-Gmbil & Co. oHG (Germany)
Ford Espana, S.A. (Spain)
Ford Leasing S.A. (Spain)
Ford of Europe Incorporated (Delaware)
Ford Motor Company (Belgium) N.V. (Belgium)
Ford Motor Company (Switzerland) S.A. (Switzerland)

Ford Motor Company A/S (Denmark)
Ford Motor Norge A.S. (Norway)
Eik and Hausken A/S (Norway)
O/Y Ford A/B (Finland)
Ford France S.A. (France)
Ford Italiana S.p.A. (Italy)
Ford Lusitana S.A.R.I. (Portugal)
Ford Motor Company Aktiebolag (Sweden)
Ford Nederland N.V. (Netherlands)

No. 80-1205

APR 7 19

ALEXANDER L. ST
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY,
Petitioner,

versus

JANET CENANCE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Under the facts of this case, is Ford Motor Credit Company a "creditor" for purposes of the Truth in Lending Act and Regulation Z of the Federal Reserve Board, and, if it is, whether it is identified as a creditor on the disclosure statement clearly, conspicuously, and in meaningful sequence as required by Regulation Z?

2. Under the facts of this case, is Ford Motor Credit Company an original creditor and, as such, liable for all disclosure violations, or a subsequent assignee and liable only for those violations apparent on the face of the disclosure statement?

3. Assuming that Ford Motor Credit Company is a creditor in this case, does Section 226.6(d) of Regulation Z relieve it of liability for disclosure violations?

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No. 80-1205

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY,
Petitioner,

versus

JANET CENANCE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

These cases involve consumer credit disclosures made in connection with the credit sales of automobiles. The facts in the *Cenance* case are typical of the credit arrangements involved in these cases. Ms.

Cenance went to Bohn Ford, Inc. (Bohn), on April 23, 1976 and selected a used car she wanted to purchase. Ms. Cenance wanted to try to establish credit on her own but Bohn's salesman told her not to worry about applying elsewhere for credit and had her sign an application for credit (2nd Supp. R. 16). The credit application Bohn had Ms. Cenance sign was provided to Bohn by Ford Motor Credit Company (Ford Credit) (2nd Supp. R. 6-7). Bohn transmitted a copy of Ms. Cenance's credit application to Ford Credit, and a few days later Ford Credit informed Bohn that it would finance the sale (2nd Supp. R. 7). Pursuant to an agreement between Bohn and Ford Credit, Ford Credit prepared and supplied Bohn with blank forms for use in connection with making retail installment sales, which, if Ford Credit agreed were correctly filled in by Bohn, would be purchased by Ford Credit in cases in which credit applications were approved. Ms. Cenance's credit application was approved, and on April 26, 1976, she signed one of the retail installment contracts. On May 3, 1976, pursuant to its earlier commitment, Ford Credit purchased Ms. Cenance's contract from Bohn (2nd Supp. R. 8). The Truth in Lending disclosures appear on the copy of the retail installment contract given to Ms. Cenance by Bohn. At the time of this transaction, Ford Credit financed all of Bohn's credit sales in which Bohn's customers did not obtain financing on their own (2nd Supp. R. 10).

Virtually all of the terms of the credit transactions were dictated by Ford Credit. The delinquency charges,

the method of rebating the finance charge in event of prepayment, and a confession of judgment clause are examples of some of the terms and conditions of credit printed on the disclosure form by Ford Credit.

At the top of the disclosure form, Bohn is identified as the seller. Ford Credit is not identified on the form, except for the following unexecuted recital, which appears at the bottom of the form:

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.
>
> Seller Bohn Ford, Inc.
>
> By _____ Title, President

In these cases the Fifth Circuit held that Ford Credit is a creditor for Truth in Lending purposes and was not identified on the disclosure form in the way required by Regulation Z,[1] the regulation adopted by the Board of Governors of the Federal Reserve System to enforce the Truth in Lending Act.[2]

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1 12 C.F.R. §226, et seq.

2 15 U.S.C. §1601, et seq.

SUMMARY OF ARGUMENT

1.

Section 226.6(a) of Regulation Z requires that all Truth in Lending disclosures be made clearly, conspicuously and in a meaningful sequence. Where two creditors issue a joint disclosure statement, each creditor must be clearly identified. §226.6(d) of Regulation Z. Under the facts of these cases Ford Credit, the extender of credit, and the automobile dealers, the arrangers of credit, were both creditors. §226.2(s) of Regulation Z. As joint creditors, they should have both been identified on the disclosure form clearly, conspicuously, and in a meaningful sequence. But they were not identified as creditors clearly, conspicuously and in a meaningful sequence.

2.

In *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F.2d 102 (3rd Cir. 1976), the extender of credit, gave the consumer a disclosure statement but the arranger of credit, the automobile seller, failed to make any disclosure. The court held that the seller violated §226.6(d) of Regulation Z. *Manning*, however, did not involve a joint disclosure statement. *Manning* did not hold that where two creditors give a joint disclosure statement to a consumer only one of them can be held liable for disclosure violations.

3.

Any conflicts that may have been created between the circuits by the decision in these cases have been

completely resolved by the changes made in disclosure requirements under the regulations of the Truth in Lending Simplification and Reform Act, which creditors can use beginning on April 1, 1981.

ARGUMENT

I.

The Decision Of The Fifth Circuit In These Cases Rests On Consideration Of Issues Not Raised In The Decisions Of The Three Other Circuits And The Official Staff Interpretation Of The Federal Reserve Board On The Creditor Identification Issue.

In its petition for a writ of certiorari, as it has in each Truth in Lending case in which it was a named defendant, Ford Motor Credit Company asserts that it was a "subsequent assignee", not a "creditor" in these cases. See Ford Credit's Pet. 9-10 and 19-26. This contention, which respondents submit is the real reason why Ford Credit is urging this court to issue the writ, has been rejected by every court that has considered it.[3] In

---

3 *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511 (5th Cir. 1976), cert. denied, 431 U.S. 929 (1977); *Mirabal v. General Motors Acceptance Corporation*, 537 F.2d 871, 874 n. 1 (7th Cir. 1976); *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 91-92 (8th Cir. 1976); *Whitlock v. Midwest Acceptance Corp.*, 575 F.2d 652 (8th Cir. 1978); *Price v. Franklin Investment Company, Inc.*, 574 F.2d 594, 599-601 (D.C. Cir. 1977); *Ljepava v. M.L.S.C. Properties, Inc.*, 511 F.2d 935, 942 (9th Cir. 1975); *Lauletta v. Valley Buick, Inc.*, 421 F.Supp. 1034, 1036 (W.D. Pa. 1976).

fact, the decisions of the Sixth, Seventh, and Ninth Circuits, which Ford Credit says conflict with the decision in these cases, are predicated on the assumption that Ford Credit is a creditor, not a subsequent assignee. See *Augusta v. Marshall Motor Co.*, 614 F.2d 1085, 1086 (6th Cir. 1979); *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423, 426 (7th Cir. 1980); *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753, 756 (9th Cir. 1978), rev'd on other grounds, *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980).

The decisions are also based on the finding that to be clearly identified as a "creditor" on the disclosure statement, as required by Regulation Z, the word "creditor" need not be used. In *Milhollin v. Ford Motor Credit Company*, 588 F.2d 753, 757 (9th Cir. 1978), rev'd on other grounds, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), the Ninth Circuit said:

> Nowhere does Regulation Z require use of the word "creditor". Here, the exact role that Ford Credit ultimately played in each transaction was clearly disclosed. Requiring Ford Credit to use the word "creditor" would not have given Consumers additional information nor better served the purposes of the Act.

In *Sharp v. Ford Motor Credit Company*, 615 F.2d 423-426 (7th Cir. 1980), the Seventh Circuit said:

> "[N]either the statute nor the regulations require that a creditor's identity be disclosed in a

particular manner or be denominated by the specific and descriptive appellation of creditor."

These decisions follow an official staff interpretation of Regulation Z, which says that: "[a]lthough the identification of a creditor is a required disclosure under §226.8(a), the disclosure does not constitute required 'terminology.' " Federal Reserve Board Official Staff Interpretation No. FD-0001, 41 Fed. Reg. 41908 (1976).

But the result reached in these cases is distinguishable from the result reached by the Sixth, Seventh and Ninth Circuits, as well as the result reached in Federal Reserve Board Official Staff Interpretation. The respondents in these cases *never* contended that Ford Credit's identity as a creditor on the disclosure statement was inadequate because the word "creditor" was not used. Respondents in these cases asserted that the placement as well as the technical, legalistic wording of the only sentence on the disclosure statement in which Ford Credit is mentioned violates Regulation Z's requirements that in multiple creditor cases each creditor must be identified, and that this disclosure, like all others, must be made clearly, conspicuously, and in meaningful sequence.[4]

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4 §226.6(a) of Regulation Z requires that all disclosures to be made "clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, at the time and in the terminology prescribed in applicable sections."

Under §226.6(d) of Regulation Z in transactions in which multiple creditors make a joint disclosure, each creditor must be clearly identified.

The disclosure form given Ms. Cenance serves as a good example of disclosure violations alleged by respondents. At the top of Ms. Cenance's disclosure statement the name and address of Bohn, the seller, is disclosed. Bohn is the arranger of credit and under §226.2(s) of Regulation Z is a creditor. Ms. Cenance had no quarrel with the way Bohn was identified, even though the word "creditor" was not used to identify Bohn.

Ford Credit's name appears on the bottom of the form, in the following sentence:

> The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the assignment set forth on the reverse side hereof.

At best, this language only tells the consumer that Ford Credit will in the future become an assignee. As the district court said, "[t]his obviously refers to Ford only as a potential assignee, and the assignment was, of course, to be executed only at some time after the plaintiff signed the form." 430 F.Supp., at 1068 (footnote omitted). This disclosure simply does not inform the consumer that Ford Credit had already agreed to extend credit in the transaction, and, for Truth in Lending purposes, was a creditor in the transaction at the moment the contract was signed.

Further, the highly technical, legalistic wording of the sentence does not clearly inform the consumer that Ford Credit is the extender of credit in the transaction. While it is true that no specific language is required by Regulation Z to clearly identify the creditors, legalese of the type used on the disclosure statement given to respondents does not pass muster.

Finally, if the requirement of §226.6(a) of Regulation Z that all disclosures be made clearly, conspicuously, and in meaningful sequence has any meaning it must mean that in multiple creditor transactions the creditors must be identified together, in the same section of the disclosure statement. Where one creditor is identified at the top of the disclosure statement and the other is only identified in the midst of the technical, legal, assignment statement, it cannot be said that both creditors were identified clearly, conspicuously and in a meaningful sequence.

The above issues were raised and correctly decided by the Fifth Circuit in these cases. The decisions of the Sixth, Seventh, and Ninth Circuits that petitioner says conflict with these cases did not address or decide these issues. In short, the fact that respondents have never claimed that the failure to use the word "creditor" was a disclosure violation distinguished these cases from the cases in the Third, Seventh, and Tenth Circuits, as well as the official staff interpretation of Regulation Z issued by the Federal Reserve Board. The results reached by the Fifth Circuit in these cases are based on issues

not considered by the staff opinion letter and the other circuit decisions.

II.

Because These Cases Involve A Joint Disclosure Statement, Which Was Prepared By Ford Credit, The Result Is Distinguishable From The Result Reached By The Second Circuit In *Manning v. Princeton Consumer Discount Co., Inc.*

The facts in these cases mandate a different result than that reached in *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F.2d 102 (3rd Cir. 1976), In these cases the automobile seller, the arranger of credit, and Ford Credit, the extender of credit, submitted a joint disclosure statement to the respondents. In *Manning* the extender of credit submitted to the consumer the disclosures required in credit loan transactions.

In *Manning* the automobile seller, the arranger of credit, failed to make any disclosures. 533 F.2d 104. The court held that under those facts the extender of credit did not have to make the credit sales disclosures. 533 F.2d 105.

The court in *Manning* did not hold that in cases like these, where two creditors — the arranger of credit and the extender of credit — make a joint disclosure, only one, the arranger of credit, can be liable for disclosure violations. Yet this incongruous result is exactly what petitioner would have this court adopt in place of the

Fifth Circuit's well reasoned opinion in these cases, The holding in *Manning*, even if correct, would be wholly inappropriate to the facts of these cases.

Further, the *Manning* decision has been so widely repudiated and distinguished that it is of little or no value as precedent. See *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1977); *Hinkle v. Rock Springs National Bank*, 538 F.2d 295 (10th Cir. 1976); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976); *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976); *Williams v. Bill Watson Ford, Inc.*, 423 F.Supp. 345 (E.D. La. 1976).

III.

The Truth In Lending Simplification And Reform Act And The Implementation Regulations Completely Resolves Any Existing Conflict Between The Circuits.

Assuming that there is a conflict in the circuits on either the use of the word "creditor" or the liability of an extender of credit in credit sale transactions, any such conflicts have been resolved by the Truth in Lending Simplification and Reform Act (Simplification Act), which is Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, P.L. No. 96-221, 94 Stat. 132. This act *changed* the definition of creditor. Under §602(a)(1) of the Simplification Act a creditor is now defined as "the person to whom the

debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness." Implementing regulations for the Simplification Act must be in place by April 1, 1981. Between April 1, 1981 and April 1, 1982, the date the revised regulations become mandatory, creditors may comply with either the old or the revised regulation. See the Annual Report to Congress for the year 1980 on Truth in Lending, Board of Governors of the Federal Reserve System.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

April ____, 1981.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the below listed counsel of record each have been served with three copies of the enclosed brief by depositing the briefs in the United States mail on the ____ day of April, 1981, in a postage-paid envelope and addressing the envelope to the counsel listed.

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No. 80-1205
IN THE

Supreme Court of the United States

October Term, 1980

FORD MOTOR CREDIT COMPANY,

Petitioner,

vs.

JANET CENANCE, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF.

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Respondents.

PETITIONER'S REPLY BRIEF.

Petitioner, Ford Motor Credit Company* ("Ford Credit"), files this Reply Brief pursuant to Rule 22.5 of the Supreme Court Rules. This Reply Brief is filed in response to the Brief for Respondents in Opposition.

I.

The Decision of the Fifth Circuit Is in Conflict With the Decisions of the Sixth, Seventh and Ninth Circuits on the Creditor Identification Issue.

Respondents argue that the decision of the Fifth Circuit on the creditor identification issue is not in conflict with the decisions of the Sixth, Seventh and Ninth Circuits. Respondents claim that the Fifth Circuit's decision dealt with the adequacy of the identification of Ford Credit on the disclo-

*A list of affiliates of Ford Credit as required by Rule 28.1 of the Supreme Court Rules is set forth in full as Appendix F to the Petition for a Writ of Certiorari and is incorporated herein by this reference.

sure form and that this issue was not decided by the Sixth, Seventh and Ninth Circuits. This argument is clearly specious.

In all four Circuits the identical Truth in Lending claim was made against Ford Credit and the identical disclosure form was reviewed by the Courts. Respondents claim that the Sixth, Seventh and Ninth Circuits decided only the question of whether the word "creditor" must be used in identifying Ford Credit. This claim is totally unfounded. All three Circuits considered the broader question of whether Ford Credit had been adequately identified in the disclosure statement. In fact, this identity of issues, parties and disclosure forms was pointed out by the Fifth Circuit in these cases:

> "This particular issue is of first impression in this circuit. The Sixth, Seventh and Ninth Circuits have, however, uniformly held that conspicuous identification of a party in Ford's position as assignee adequately describes the relationship of the parties." 621 F.2d at n.2.

It is difficult to imagine a case presenting a more clear conflict in the Circuits. The same form of disclosure of Ford Credit's status as an assignee of the contract has been approved for use in the Sixth, Seventh and Ninth Circuits but has been disapproved for use in the Fifth Circuit. This Court should grant the Petition for a Writ of Certiorari to resolve this conflict.

II.

The Decisions of the Third, Fifth, Tenth and District of Columbia Circuits Are in Conflict With Respect to the Disclosure Obligations of Multiple Creditors Under Regulation Z.

Respondents' argument that the Circuits are not in conflict on the multiple creditor issue is completely refuted by the

following quotation from the decision of the District of Columbia Circuit in *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. 1977):

> "There has been a split among the Circuits as to the proper construction of this regulation. The Third Circuit, in *Manning v. Princeton Consumer Discount Co.*, 533 F.2d 102 (3d. Cir.), *cert. denied*, 429 U.S. 865, 97 S.Ct. 173, 50 L.Ed.2nd 144 (1976), found that a transaction in which an automobile dealer arranged a loan for a customer with a finance company was in reality a 'credit sale,' and that both the dealer and the finance company were 'creditors' within the meaning of the Act and the Regulation. It held, however, that the duty of each to make the required disclosures, and the liability for failure to do so, was controlled by Section 226.6(d). It noted that the first sentence of that section would require 'each creditor' to make 'those disclosures . . . which were within his knowledge and the purview of his relationship with the customer,' but concluded that the more specific language of the third sentence controls whenever a 'seller . . . arranges credit.' By its terms, the *Manning* court held, the third sentence limits both the duty and the liability to the seller alone.
>
> Three other Courts have reached the opposite conclusion." 574 F.2d at 601.

Respondents attempt to distinguish the decision of the Third Circuit in *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F.2d 102 (3d Cir. 1976) but conclude by observing that the decision in *Manning* has been repudiated by other Circuits. [Resp. Br. In Opposition at 10-11.] Respondents attempt to distinguish *Manning* by arguing that *Manning* did not involve a joint disclosure statement of the type submitted to Respondents. Even assuming that the disclosure statements provided to Respondents can be char-

acterized as joint disclosure statements, the legal principle established in *Manning* would apply to these cases. In *Manning*, the Third Circuit held that, where the seller and the finance company are both creditors, section 226.6(d) of Regulation Z places all credit sale disclosure obligations upon the seller where the seller acts as an arranger of credit. In these cases, the plaintiffs have likewise claimed that the sellers acted as arrangers of credit and Ford Credit acted as the credit extender. The Fifth Circuit sustained these claims but, like the Tenth and District of Columbia Circuits, declined to follow the Third Circuit's holding in *Manning* placing all credit sale disclosure obligations upon the sellers as arrangers of credit.

Respondents' argument that the Third Circuit's decision has been repudiated in other Circuits is a concession that there is a conflict in the Circuits on this issue. And, the above quotation from the *Price* case clearly indicates that even the Circuits recognize the conflict in their decisions on the multiple creditor issue. This Court should grant the Petition for a Writ of Certiorari to resolve this conflict.

III.

The Truth in Lending Simplification and Reform Act Does Not Resolve the Conflict in the Circuits.

Respondents argue that the Truth in Lending Simplification and Reform Act has now resolved the conflict in the Circuits described in the Petition. This is simply not true.

The Truth in Lending Simplification and Reform Act will not resolve the conflict in the Circuits as it affects the countless millions of disclosure statements that have been used by Petitioner and creditors in the massive installment sales financing industry. Although the Truth in Lending Act has a one year statute of limitations for affirmative claims brought by consumers, many courts have not applied this

statute of limitations to Truth in Lending claims asserted by way of counterclaim, recoupment or offset. *See* Willenzik and Leymaster, *Recent Trends in Truth-In-Lending Litigation*, 35 Bus. Law. 1197, 1218-19 (1980). Thus, the conflict and confusion in the Circuits will continue for many years into the future if the Petition is not granted. In fact, the conflict and confusion could worsen once the Simplification Act becomes effective since the disclosure rules applicable to installment sales financing will vary both by the Circuit deciding the issue and by the date when the contract was signed.

The confusion and uncertainty caused by the conflict in the Circuits described in the Petition will continue to spawn litigation and will expose creditors to massive liability under the Act and the Regulation. The enormous importance of this case to the consumer finance industry is demonstrated by the fact that Amicus Curiae Briefs in support of the Petition have been filed by the American Bankers Association, the California Bankers Association, the Consumer Bankers Association and the National Consumer Finance Association. This Court should grant the Petition to settle these important questions of federal law.

IV.

Conclusion.

The Respondents have failed to negate the clear conflict in the Circuits on the questions presented for decision. These questions concern important issues of federal law of vital concern to consumers and to the entire consumer finance industry. There is a clearly demonstrated need for uniformity of decision on these questions.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 80-1205

IN THE

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v.

JANET CENANCE, *et al.*, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION

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February 13, 1981

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari. The Petitioner has consented to the filing of such brief, as have some of the Respondents. The remaining Respondents have not, as yet, replied to our requests for consent. When such written consents are received, they shall be promptly filed.

Interest of the American Bankers Association

The American Bankers Association is the principal trade association of the commercial banking industry in the United States. Its membership comprises approximately 90% of all American banks. As of the latest date for which figures are available,* commercial banks hold about 53% of all outstanding automobile-related installment credit, ($61.8 billion) compared to 29% ($33.8 billion) for finance companies, including, but not limited to automobile finance companies such as Ford Motor Credit Company. Of the automobile-related credit extended by commercial banks, about 43% ($26.5 billion) is extended directly to individuals; the remaining 57% ($35.3 billion) is so-called "indirect paper," *i.e.*, loans which are purchased from automobile dealers or other extenders of credit, under arrangements similar to those involved in this case. Consequently, the banking industry has a considerable stake in the outcome of any case which could impose upon banks new and unanticipated responsibilities and exposure to liabilities. This is such a case.

Since commercial banks deal both directly with automobile purchasers and with automobile dealers, as opposed to automobile finance companies which deal only with the dealers, and since many commercial banks are directly regulated and examined by the federal agency responsible for promulgating and interpreting Truth in Lending regulations, the industry is in a position to present and describe the issues in this case from a unique perspective.

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* Federal Reserve Statistical Release, "Consumer Installment Credit — November 1980" (Jan. 12, 1981).

WHEREFORE, it is respectfully requested that the Court grant the American Bankers Association leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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February 13, 1981

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1205

FORD MOTOR CREDIT COMPANY, *Petitioner*,

v.

JANET CENANCE, *et al.*, *Respondents*.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The American Bankers Association respectfully submits this brief as *amicus curiae* to urge that this Court grant the petition for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit which held, for purposes of the Truth in Lending Act and the Federal Reserve System's Regulation Z, that an assignee was not an assignee and that an identified party was not identified. In doing so, the court acted inconsistently with the decisions of the Courts of Appeal of other Circuits, and in disregard of the principles laid down by this Court in the recent Truth in Lending case of *Ford Motor Credit Company* v. *Milhollin,* 444 U.S. 555 (1980). Inconsistent lower court decisions in Truth in Lending cases destroy the statutorily mandated goal of uniformity of disclosures, and this particular decision

subjects financing institutions of all types to potential, but previously unanticipated, liability.

As noted in the foregoing Motion, the amount of money devoted by the nation's commercial banking industry to the purchase of automobile dealer paper is now approximately $35.3 billion.[1] That great a sum translates into individual transactions numbered in the millions. If each of the millions of individual automobile buyers were to claim and recover "not . . . less than $100 nor greater than $1,000,"[2] for disclosures, or lack of disclosures—which harm no one and serve no purpose—then the effect on the industry would clearly be devastating.[3] Yet that could be the result should the decision of the Fifth Circuit stand unreviewed and unreversed.

SUMMARY OF THE ARGUMENT

Virtually any Truth in Lending Act issue is an important question of federal law which ought to be decided by the Supreme Court, within the meaning of the Court's Rule 17.1(c). If for no other reason, this is so because the Truth in Lending Act has engendered such a tremendous number of lawsuits in the federal courts and because the complexity of the law and the confusion

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[1] Federal Reserve Statistical Release, "Consumer Installment Credit — November 1980" (Jan. 12, 1981).

[2] 15 U.S.C. §1640(a)(2)(A)(i).

[3] No precise figures on the number of individual transactions are available, but if we assume that the average outstanding balance on automobile installment contracts is $5,000 — a very high estimate — then there are at least seven million individual transactions involved, and liability ranging from $700 million to $7 billion could be imposed on banks for failure to identify themselves *as* creditors, even though they are otherwise clearly identified.

stemming from the often conflicting results of that litigation have caused great uncertainties in an industry which affects millions of people every day. This Court's grant of writs of certiorari in two other Truth in Lending cases this term, following a Truth in Lending decision just last term, is a recognition of this problem.

The result reached by the Fifth Circuit in the case below is inconsistent with the decisions of other circuits in several respects, thus adding to the overall confusion surrounding the Truth in Lending Act. Moreover, the decision is incorrect. The Fifth Circuit held that the financing institution was not an "assignee" within the meaning of the Act — a decision having significant consequences for all financing institutions under what are fairly typical circumstances. This decision is inconsistent with the great weight of authority giving a commonly accepted commercial meaning to the term "assignee." The court below also held that the financing institution in this case was not properly identified within the intendment of applicable regulations. Here again, the decision flies in the face of fact, reason, logic, and authority.

This Court should grant the writ of certiorari in the case. With a decision here, and in the other Truth in Lending cases now pending before the Court, perhaps some semblance of order and predictability can be restored to this field of law.

ARGUMENT

I. This Case Presents Important Issues Of Federal Law Which Should Be Decided By This Court.

As indicated in the foregoing Motion of the American Bankers Association for Leave to File a Brief as *Amicus Curiae,* and in Ford Motor Credit Company's

Petition for Certiorari, the issue presented in this case is an important one in its own right, in that the outcome of the case will affect the validity of an enormous number of Truth in Lending disclosure statements now outstanding. But as important as the case is on its own merits, its significance grows immeasurably when it is placed in a larger context. Cases such as this and the two other Truth in Lending cases in which the Court has already granted certiorari in this term[4] will ultimately determine whether the Truth in Lending Act is to become the meaningful disclosure statute that Congress intended it to be, or will remain a confusing morass of often conflicting interpretations, with great liability premised upon the most insignificant details which are meaningless to the actual credit customers.[5]

The object of the Truth in Lending Act is clear enough. In 1967, the Senate sponsor of the bill, William Proxmire, described the problem to be addressed in these terms:

> Each segment of the credit industry quotes credit terms on a different basis. How many consumers

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[4] *Anderson Brothers Ford* v. *Valencia,* 617 F.2d 1278 (1980), *cert. granted,* _____ U.S. _____, 66 L.Ed.2d 242 (Nov. 10, 1980) (No. 80-84); and *American Express Co.* v. *Koerner,* 615 F.2d 917 (1980), *cert. granted,* _____ U.S. _____, 49 U.S.L.W. 3492 (Jan. 12, 1981) (No. 80-202).

[5] We do not exaggerate. This characterization is confirmed in *Consumer Credit Protection: A Report of the Commission on Federal Paperwork,* July 29, 1977, pp. 32-33:

> Controversies abound over interpretations of the law and regulation. . . . Novel and confusing constructions often result from a court's failure to recognize the business practices and terminology that relate to the law and regulations. . . . A frequent difficulty, then, for creditors under Truth-In-Lending and Regulation Z is determining precisely what is to be disclosed. This can be difficult in routine and standard transactions and almost impossible in more complicated ones.

> realize, for example, that a 6-percent automobile loan is really a true annual rate of 11 percent and sometimes more when measured against the declining balance. Other lenders use a discount rate. Still others use a monthly rate. . . . Some count all expenses in the rate, while others charge separately.
>
> Some lenders quote only the monthly payments.
>
> The end result is that the consumer is faced with a bewildering variety of credit terms and rate concepts. Unless he is a skilled mathematician, he is unable to make intelligent and simple comparisons between different sources of credit.[6]

Consequently, Congress wrote into the law that its purpose was

> to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him. Truth in Lending Act, §102 (15 U.S.C. §1601).

See also Ford Motor Credit Company v. *Milhollin, supra* at 568.

In order for disclosures to be "meaningful" and in order for them to be used for purposes of "comparison shopping" for credit, those disclosures need only be uniform. There is nothing intrinsically sacred about the specific methods of disclosure mandated by law and regulation — other methods could just as well have been selected, just as colors other than red and green could have been selected for traffic lights. One particular method was chosen solely to assure the necessary uniformity. And yet, somewhere along the line over the past dozen years, the concept of uniformity has been largely

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[6] *Truth in Lending: Hearings on S. 5 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. 2 (1967).

lost and this Court's own experience with Truth in Lending cases demonstrates the point:

• Before this Court's decision in the *Milhollin* case, *supra,* the need to disclose the existence of acceleration clauses in consumer credit contracts was open to serious question. Lower courts had decided the issue both ways, and for widely different reasons.

• Before this Court settled the law on the "Four Installment Rule" in *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973), district courts in at least Florida and Illinois had reached one conclusion on the issues and the Fifth Circuit had reached a contrary one.

• In the *American Express* case now pending before the Court, *supra,* the issue involves the interpretation of a Truth in Lending Act provision governing the circumstances under which a credit card can be revoked. Again, the lower courts have decided the issue both ways.

• In the *Valencia* case, *supra,* the issue is whether one must disclose that returned or unearned insurance premiums have been assigned to the creditor. Again, the lower courts have come down on both sides.

• In this case as well, the questions of who is a creditor, and who is an assignee, and who must be identified as a creditor for purposes of the Truth in Lending Act have muddled answers because of irreconcilable decisions in the lower courts.

The fact that major confusion and inconsistency permeates the entire field of Truth in Lending law among consumers, courts and creditors is not surprising since the implementing regulation is 53 pages long —

consisting of 153 highly technical subsections — the Federal Reserve has issued more than 1,500 staff interpretations of the regulation since its inception,[7] and the federal courts have been hearing an average of about 100 Truth in Lending Act lawsuits every month for a dozen years.[8]

Thus, it appears that the responsibility for carrying out the Congressional intent to bring uniformity to the disclosures of the cost of credit devolves upon this Court and this Court alone.

II. The Court Below Erroneously Decided That The Financing Institution Was Not An Assignee.

Under section 115 of the Truth in Lending Act (15 U.S.C. §1614), a subsequent assignee is liable for the disclosure violations of the original creditor only where the violation is apparent on the face of the instrument assigned. In this case, the alleged disclosure violations included such things as the improper characterization of a $1.00 lien recordation fee and certain other documentary fees. Such alleged violations were not apparent on the face of the instrument. Consequently, it is important to determine whether Ford Motor Credit Company was an original creditor or a subsequent assignee in this case. In order to do that, the terms must be defined.

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[7] In fact, some of these interpretations revoke or modify earlier interpretations. *Compare*: Opinion FC-0029 with FC-0153; Opinion FC-0042 with FC-0164; Public Information Letters 735, 833 and 850 with Opinion FC-0157; Public Information Letters 265, 734, 864 and 1136 with Opinion FC-0165; Public Information Letter 1232 with Opinion FC-0152. (12 C.F.R. Part 226 Appendix).

[8] *Annual Report to Congress on Truth in Lending for the Year 1980,* Board of Governors of the Federal Reserve System, p. 3.

"Creditor" is defined by the statute (15 U.S.C. §1602(e)) and by Regulation Z (12 C.F.R. §226.2(s)) as one who, in the ordinary course of business, regularly extends or arranges for the extension of *consumer* credit. Consumer credit, in turn, is defined as credit extended to a natural person for personal, family or household purposes (15 U.S.C. §1602(h)). In the case of Ford Motor Credit Company and in the case of banks operating in a similar fashion, the financing institution is not a creditor within the meaning of the law because it does not extend credit to a natural person for any personal, family or household use. Rather, the principal purpose of the financial transaction here in issue is to enable the automobile dealership to operate its business. It is principally a commercial transaction which assures that the dealer remains in the business of selling automobiles, and is not forced into the business of collecting and processing monthly installment payments in order to have readily available in sufficient amounts the funds to pay for its merchandise. Consumer credit is, of course, extended in cases like this one, but it is extended by the automobile dealer, not the financing institution.

The terms "assignee" or "subsequent assignee" are not defined in the applicable statute or regulation. Where that is so, the rule of statutory construction established by Justice Story and this Court in 1824, and followed ever since,[9] must be applied: "Congress must be understood to use the word in its known commercial sense." *Two Hundred Chests of Tea,* 22 U.S. (9 Wheat.) 430, 438 (1824). In determining what is the normal commercial meaning of "assignee," a useful analog is the application of various state usury laws.[10]

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[9] *See* cases collected in 2A Sutherland, *Statutory Construction,* §47.31 (4th ed. 1973).

[10] It is another familiar rule of statutory construction that "the interpretation of a doubtful statute may be influenced by language of

Most of the states have enacted laws which prohibit the imposition or collection of interest in excess of a specified percentage on certain loans. But the courts carefully distinguish between loans and credit sales. Usury laws apply only to the former. Where a seller negotiates a contract with a buyer whereby the buyer may defer payment of the purchase price or may pay the purchase price in installments, a credit sale has taken place and the usury statutes do not apply. When a financing institution purchases the buyer's note, even close in time to the original transaction, that fact does not make the transaction a loan; rather it makes the financing institution an assignee.

In *Boerner* v. *Colwell Company,* 145 Cal.Rptr. 380 (1978), the defendant Colwell was a mortgage banker which purchased installment contracts for the sale of vacation homes. California had a usury ceiling of 10%, and the finance charge on each of the installment contracts in issue in that case exceeded the 10% figure. A plaintiff class claimed that the transactions, in substance, if not in form, were loans to the plaintiffs

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other statutes which are not specifically related, but which apply to similar persons, things or relationships." Sutherland, *Id.* at §53.03. Certainly that is the case with respect to the Truth in Lending Act and usury statutes under the facts here. This is a rule of construction that the Supreme Court has often applied. *See e.g., Overstreet* v. *North Shore Corporation,* 318 U.S. 125, 131-32 (1943) (construing similar language in the Federal Employees Liability Act and the Fair Labor Standards Act in the same fashion); *Indian Towing Company* v. *United States*, 350 U.S. 61, 67 (1955) (construing similar language in the Federal Tort Claims Act and the Suits in Admiralty Act in the same fashion); and *Fedorenko* v. *United States,*_____U.S._____ (49 U.S.L.W. 4120, 4125, fn. 28) (Jan. 21, 1981) (construing the term "misrepresentation" in the Displaced Persons Act in the same fashion as an earlier construction of the same word in the Immigration and Nationality Act of 1952).

from Colwell as the original lender, and, therefore, subject to the usury ceiling. The California Supreme Court's description of the transaction makes it clear that the transaction was virtually identical to the one in question in the instant case:

> [T]he financing institution occupied a central position in shaping the transactions from the outset. The buyers having determined that they would go forward with the contemplated construction of their vacation homes only if financing could be obtained, the builders set in motion a procedure whereby, in accordance with prior arrangements made by them with Colwell, the feasibility of financing *by Colwell* could be determined. Under this procedure the parties were supplied with forms developed and supplied *by Colwell* which essentially set forth the terms under which *Colwell*, through the device of contemporaneous assignment at a prearranged discount, would agree to finance the contemplated purchase and sale. Included among these terms was the finance charge to be paid by the buyers. *Colwell,* not the builders, passed upon the question of the buyer's credit reliability, and only when *it* determined that such credit reliability was acceptable *to it* did it agree to participate in the transactions as the financing agent.
>
> Plaintiffs [urge] that this kind of participation by the financing institution rendered it a "lender" of money within the meaning of the usury laws. *Id.* at 388-89 (Emphasis in original).

Nevertheless, the court affirmed a trial court finding that the transaction was a bona fide credit sale, not a part of a loan transaction clothed in the form of a credit sale, and that the assignment of the installment sale contract was a true assignment to Colwell, not a loan by Colwell in the guise of an assignment. *Id.* at

383. The court pointed out, in words equally applicable to the instant case, that

> [t]he role of the financing institution in transactions of this kind is basically a beneficial one, for *the essence of their function is that of providing needed financial assistance to sellers* unable to handle their own consumer financing, thus permitting those sellers to compete on a more equal footing with their more established competitors. *Id.* at 391. (Emphasis supplied.)

The court recognized an exception to this general rule, namely that the usury laws would apply where the assignment was not a good faith transaction, and was essentially a device to evade the usury laws. However, it found no evidence of lack of good faith on the part of Colwell.

Something akin to "good faith" considerations appears in the Truth in Lending Act as well. If a subsequent assignee takes a note with a disclosure error apparent on its face, then the assignee becomes liable to the customer as though the assignee was an original creditor. If no disclosure error is apparent on the face of the instrument, then the assignee's disclosure liabilities are diminished. 15 U.S.C. §1614. Since the alleged errors involved in this case are not apparent on the instrument, the financing institution remains a bona fide assignee and does not acquire the obligations of an original creditor.

Boerner is not a singular case. The California Supreme Court pointed out — correctly — that its decision conformed to the law in the great majority of jurisdictions. *See* cases collected at Annot. 14 A.L.R. 3d 1065, 1091-1112 (1967).

In summary of this point, a financing institution is generally held to be an assignee in cases where the relevant facts are identical to the facts here, applying statutes analogous to the one in issue here, where plaintiffs argue that the institution is not an assignee, but rather an original lender. Cases such as the *Boerner* case in the California Supreme Court have supplied a commonly understood commercial meaning to the term "assignee" and that is the meaning Congress must have intended in a statute also dealing with interest rates. Therefore, Ford Motor Credit Company, and similarly situated financing institutions, are assignees under the Truth in Lending Act.

III. The Court Below Erroneously Decided That The Financing Institution Was Not Identified.

Nothing in the Truth in Lending Act requires that the identity of creditors be disclosed to consumer borrowers. That obligation arises only from the Federal Reserve's Regulation Z, 12 C.F.R. Part 226.[11]

Section 226.6(d) of the Regulation requires only that each creditor shall be clearly identified. The ostensible reason for this requirement is well set forth in the opinion of District Court Judge Rubin in the *Cenance* case below:

> [T]he creditor's identity is not a frivolous or extraneous bit of information, and may be important in the borrower's decision to commit himself to a

[11] The Act itself was designed to assure that customers would have accurate and complete information about the *cost* of credit. The identity of the creditor has nothing to do with the cost of credit where that cost is uniformly disclosed. For this reason, Ford Credit argued in the district court that the Federal Reserve's promulgation of this section of the regulation exceeded its statutory authority. The argument, however, has not been preserved on appeal.

particular credit arrangement. Informed persons sometimes do not choose to borrow from a lender known to be difficult to deal with and exacting in its demands. *Cenance* v. *Bohn Ford,* Civil Action No. 76-2878 (E.D.La. April 14, 1977), reprinted in Petition for Writ of Certiorari, *Ford Motor Credit Company* v. *Cenance,* No. 80-1205, filed January 19, 1981, Appendix B, p. 18.

Keeping in mind that *"[m]eaningful* disclosure does not mean *more* disclosure," *Ford Motor Credit Company* v. *Milhollin, supra* at 568 (emphasis in original), it is clear that identification of a creditor *as such*, which is not required by a strict reading of the regulation in issue, supplies no useful information to the borrower above and beyond the information which is supplied by the mere identification of a "creditor." This is true even if the so-called "creditor" is described as a "subsequent assignee" in the disclosure document, and it would be true even if the designation of the "creditor" as a "subsequent assignee" was technically incorrect.

The simple fact of the matter is that Ms. Cenance *knew* the party to whom she would be making her monthly payments because that information was set forth explicitly on the Retail Installment Contract directly adjacent to her signature. If Ms. Cenance was an "informed person," or if she had reason to believe that Ford Credit was "difficult to deal with and exacting in its demands," then the clause in the contract purporting to assign the contract to Ford Credit certainly supplied her with sufficient information in this respect to make a "decision to commit [her]self to a particular credit arrangement." Calling Ford Credit a "creditor" rather than an "assignee" would not have added one whit to the information available to Ms. Cenance.

The dealer in this case, Bohn Ford, could have prepared its own form of Retail Installment Contract, without any reference whatsoever to either the possibility of assignment or to any particular possible assignee. It could then have decided, after the fact, to assign the contract to one of any number of financing institutions, entirely unbeknownst to Ms. Cenance until well after she entered into the agreement. In that event, no violation of the law or regulation stemming from a failure to identify a creditor would have occurred. That scenario would present a curious anomoly: Compliance with a disclosure statute may be achieved by supplying the customer with less than complete information, whereas an effort to supply complete information, as Bohn Ford and Ford Credit did here, somehow violates the statute. Ms. Cenance could have found herself obligated to some financing institution which she would not, under any circumstances, choose herself, and it would have been entirely legal. Here, she knew she would be dealing with Ford Credit, and still willingly entered into the contract. Yet she now claims that Ford Credit was in violation of the law because it was not "identified."

The court below has thus written into the regulation words that are not there, requiring that the financing institution not only be identified, but identified *as a* creditor. In doing so, the Court of Appeals acted in conflict with the decisions of the Sixth, Seventh and Ninth Circuits,[12] each of which has held that the form of identification of the financing institution used in this

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[12] *See: Augusta* v. *Marshall Motor Co.*, 614 F.2d 1085 (6th Cir. 1979); *Sharp* v. *Ford Motor Credit Co.*, 615 F.2d 423 (7th Cir. 1980); and *Milhollin* v. *Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978), rev'd on other grounds, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980).

case was adequate for purposes of the Truth in Lending Act and Regulation Z. This conflict should be resolved, and resolved in favor of the principles of "meaningful disclosure, not more disclosure."

CONCLUSION

For all of the reasons stated herein, the *amicus,* American Bankers Association, on behalf of its 13,250 member financial institutions, respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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February 13, 1981

No. 80-1205

In the Supreme Court of the United States

OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY,
Petitioner,

vs.

JANET CENANCE, et al.,
Respondents.

Motion for Permission to File Brief Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Ciruit and Brief Amicus Curiae

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OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY,
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vs.

JANET CENANCE, et al.,
Respondents.

Motion for Permission to File Brief of Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, the California Bankers Association (hereinafter referred to as "CBA") moves this Court for permission to file a Brief Amicus Curiae in this case in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Petitioner.

In support of this motion, CBA respectfully alleges as follows:

1. CBA is a trade association, and all banks doing business in California are members of CBA.

2. Banks in California provide wholesale financing to automobile dealers and purchase retail installment sale contracts from automobile dealers covering products sold by them.

3. These retail installment sale contracts are subject to the Truth in Lending Act (15 USC, Section 1601 et seq.) and Regulation Z (12 CFR Section 226).

4. The terms of sale, price, down payment, finance charge, payment and other credit terms of installment sale contracts purchased by banks are negotiated by the automobile dealer with the buyer.

5. As a general rule, banks have no contact with the buyers signing installment sale contracts concerning the contract until after purchasing the contract on an assignment from the dealer who made the sale.

6. The Federal Reserve Bank of San Francisco advises that during April, 1979, banks in the Twelfth Federal Reserve District purchased installment sale contracts for the purchase of automobiles totaling $312,000,000, and held a total of such contracts amounting to $7,465,000,000.

7. In order to purchase automobile installment sale contracts, banks need to know: (a) whether or not they are to be treated as "creditors" or "subsequent assignees," (b) if they are treated as "creditors," how they must be identified on the disclosure statement, (c) who must make disclosures, and (d) if they are to be treated as creditors, what disclosures they must make.

8. There is ambiguity and conflict among the decisions of the various United States Courts of Appeals regarding these issues.

9. CBA is familiar with the factual and legal issues raised in this case, and believes that the decision in this case has added to this ambiguity and conflict.

10. CBA has read the Petition for a Writ of Certiorari filed herein and wishes to add additional argument in support of the Petition concerning the importance of resolving the ambiguity and conflict concerning these issues.

11. CBA has attempted, but has been unable, to obtain the consent required by Rule 36.1 of the Rules of the Supreme Court of the United States.

CBA respectfully requests that this Court grant it permission to file an Amicus Curiae Brief in support of the Petition for a Writ of Certiorari. The Brief, which is submitted with this Motion and has been served upon Petitioners and Respondents, is limited in scope to setting forth the reasons why the Petition should be granted.

Dated: February 11, 1981.

Respectfully submitted,

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No. 80-1205

In the Supreme Court of the United States

OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY,
Petitioner,

vs.

JANET CENANCE, et al.,
Respondents.

Brief Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

I

THE INTEREST OF CBA

The California Bankers Association (hereinafter referred to as "CBA") is a trade association incorporated under the laws of the State of California. Its primary purpose is "to promote, to provide a medium for study and discussion of problems in respect to, and to express opinions on questions affecting, the general welfare of commercial banking and trust company businesses." (Articles of Incorporation)

All banks doing business in California are members of CBA.

Among their activities, banks purchase a very substantial volume of "automobile dealer paper." That is to say, that banks, under varying arrangements with automobile dealers, purchase the installment sale contracts which automobile dealers have entered into with buyers purchasing their products.

While figures showing the exact dollar volume of this financing in California are not readily available, the Federal Reserve Bank of San Francisco advises that during April, 1979, banks in the Twelfth Federal Reserve District purchased automobile sale contracts totalling $312,000,000, and held a total of such contracts amounting to $7,465,000,000. If the average contract was $10,000, it would mean that these banks purchased 31,200 contracts and held a total of 746,500 contracts in April, 1979.

The banks in California are genuinely concerned about complying with the laws and regulations governing their business and investments, and make a conscientious effort to do so. Complying with Regulation Z, 12 CFR § 226, (hereinafter referred to as the "Regulation") is expensive. For example, General Motors Acceptance Corp. has testified before Congress that since the effective date of the Truth in Lending Act, 15 USC, Section 1601 et seq. (hereinafter referred to as the "Act") and the Regulation, the company has spent more than $3,000,000 to accomplish changes to its forms. (Oversight Hearings on the Simplification of the Truth in Lending Act Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 2d Sess. 558, 1978). At the same hearings the National Consumer Finance Association testified that one Circuit Court decision engrafting a new requirement onto the Regulation can cost between $3,000,000 and $6,000,000.

The complexity of the Act and the Regulation, with their many judicial and agency interpretations, makes compliance a difficult and expensive burden. When the court decisions are in conflict, compliance becomes an impossible burden.

The Act provides for fines or imprisonment for willful and knowing violations and for civil liability for failure to comply with any requirement of the Act. (Sections 112 and 130). Action may be brought within one year from the date of violation, and civil liability, in the case of individual actions, is fixed at twice the amount of the finance charge in connection with the transaction, with limits of not less than $100 or more than $1,000.

Because the finance charge for an automobile installment sale contract is likely to be at least $500, any civil liability for each of these contracts is likely to be the maximum of $1,000.

If we assume that banks in the Twelfth Federal Reserve District purchased 31,200 contracts in April 1979, as indicated above, and that in April, 1980, they purchased only half as many, i.e. 15,600 contracts, and that each of these contracts is required to and fails to disclose the purchasing bank in the manner required by the Fifth Circuit, the civil penalties, aside from the criminal penalties, on these 15,600 contracts could amount to $15,600,000. Furthermore, if this figure of 15,600 represents a monthly average of the number of installment sale contracts purchased during the past 12 months (within the statute of limitations), and if they contain similar violations, the civil penalties for an annual total of 187,200 contracts could amount to as much as $187,200,000.

In view of these criminal and civil penalties, banks have the right to know what is required. On many occasions this

Court has recognized the public's right to know what is required to comply with the law.

In *Bouie v. City of Columbia,* 378 U.S. 347, 12 L.ed 2d 894, 898 (1964), the Court held:

> ". . . We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In *Lanzetta v. New Jersey,* 306 U.S. 451, 83 L.ed. 888, 890 (1939), the Court held:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. *All are entitled to be informed as to what the state commands or forbids.*" (Emphasis added).

II

THE ISSUES AND CONFLICTS

These cases (hereinafter referred to as the *"Cenance"* cases) present four Truth-In-Lending issues faced by all banks when they purchase an installment sale contract from a dealer. These issues are:

A. Is the bank a "creditor" or an "assignee" within the meaning of the Act and Regulation?

B. If the bank is a "creditor," must it be identified as "creditor"?

C. Who must make the disclosures?

D. If the bank is a "creditor," what disclosures must it make?

Unlike many Truth-In-Lending cases where the issues deal with what is in a particular contract, these four issues

are present in every contract purchased by banks because they relate to the basic structure of installment sales financing and how disclosures should be made for Truth-In-Lending purposes. Thus, a uniform and logical resolution of these issues is vital and is of importance to the entire industry.

Despite the urgent need for certainty and uniformity in the disclosures that must be made in installment sales financing, the Circuits are hopelessly in conflict on the above issues. The *Cenance* cases sharply present this conflict.

A. Creditor Or Assignee

In the *Cenance* cases the Court held that Ford Motor Credit was not a subsequent assignee.

The Act itself recognizes that the original creditor and a subsequent assignee are separate and different parties, and provides different obligations for them.

Section 131 of the Act provides:

> "Except as provided in section 125(c) and except in the case of actions brought under section 130(d), in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this title shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this chapter. This section does not affect the rights of the obligor in any action against the original creditor."

Financial institutions have relied on this distinction between a creditor and assignee for determining their obligations and in handling installment sale contracts.

The legislative history of the Act and the Truth In Lending Simplification and Reform Act, (Public Law 96-221-

Mar. 31, 1980) dealing with the liability of assignees and Congress's intention that assignees in typical installment sales financing transactions are not to be considered "creditors" within the meaning of the Act, is carefully and pointedly set forth in Appendix D, at page 94 of Petitioners's Petition.

The difference between the roles of a creditor and a third party financing institution has been recognized by the Supreme Court of California. In *Boerner v. Colwell Co.* 145 Cal. Rptr. 380, (1978) the California Supreme Court stated:

> ". . . The question before us, therefore, resolves itself to this: Does the mere participation by a non-exempt financing institution in a transaction such as that before us—no matter how well-intentioned and no matter how fully disclosed to the contracting parties—operate to convert what would otherwise be regarded as a bona fide credit sale (such as, for example, in the case where the builder is able to finance the sale itself without institutional assistance) into a loan subject to the usury laws?
>
> "Under the law of this and the significant majority of other jurisdictions the answer is clearly no." (145 Cal.Rptr. 380, 390)
>
> . . . . .
>
> "The role of the financing institution in transactions of this kind is basically a beneficial one, for the essence of their function is that of providing needed financial assistance to sellers unable to handle their own consumer financing, thus permitting those sellers to compete on a more equal footing with their more established competitors. While regulation of these activities is essential for the protection of the vital interests of the consumer, the Unruh and Rees-Levering Acts provide ample evidence of the Legislature's willingness to provide such regulation; we must assume that the

> lawmakers, in light of the instant opinion, will make haste to treat the narrow, perhaps inadvertently unregulated area with which this case is concerned. (See fn.12, ante.) In any event, it is our view that the instrument of the usury laws has no place in the field of bona fide credit sale financing, and that its use must be limited to those cases in which the record clearly reveals that the substantial intent of the parties was to effect the hire of money at an excessive rate of interest rather than to finance a bona fide sale of property. This is not such a case." (145 Cal. Rptr. 380, 391)

There is a difference between an original creditor and a subsequent assignee, and banks need to know which they are deemed to be in order to determine their obligations.

B. If Bank Is Creditor, Must It Be Identified As "Creditor"

There is a conflict as to whether or not a financial institution must be disclosed as "creditor."

In the *Cenance* cases the contract provided as follows: "The foregoing contract hereby is accepted by the seller and assigned to Ford Motor Credit Company in accordance with the terms of assignment set forth on the reverse side hereof." The Fifth Circuit Court found that: (1) the dealer had a standing agreement with Ford Motor Credit, (2) the dealer and Ford Motor Credit prearranged for the assignment of the contract to Ford Motor Credit, (3) at no time did the risk of finance reside with the dealer, (4) the sale transaction was conditioned upon acceptance of the credit application by Ford Motor Credit, and (5) the credit application form was prepared by Ford Motor Credit. The Fifth Circuit Court held that:

> "Disclosure of Ford as subsequent assignee does not clearly identify it as creditor. Additionally, Ford cannot be both a creditor and a subsequent assignee . . . Accordingly, because Ford is a creditor for Truth-In-

> Lending purposes and did not disclose that status except by reference to assignment, we hold that Ford violated Section 226.6(d) of Regulation Z . . ." (621 F.2d 130, 134)

In *Milhollin v. Ford Motor Co.*, 588 F.2d 753 (9th Cir. 1978), *rev'd on other grounds, Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555 (1980), the contract had the same notice of assignment to Ford Motor Credit as in the *Cenance* cases. The Ninth Circuit Court found that: (1) Ford Motor Credit had a program for purchasing contracts from the dealer, (2) Ford Motor Credit provided forms of credit applications, contracts and rate charts, (3) the contracts were typically assigned to Ford Motor Credit shortly after the sales were consummated, and (4) the dealer may obtain prior approval from Ford Motor Credit for customers with marginal credit ratings. In *Milhollin* the Ninth Circuit Court held that:

> "For our purposes it is unnecessary to decide whether the identification of each creditor is a required disclosure or if Ford Credit is a creditor of Consumers (Plaintiffs). Assuming an affirmative answer to these questions, we conclude that the status of Ford Credit, even if it is a creditor, was adequately disclosed." (588 F.2d 753, 756).

In *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423 (7th Cir. 1980), the contract had the same notice of assignment to Ford Motor Credit as in the *Cenance* and *Milhollin* cases. The Seventh Circuit Court found that: (1) Ford Motor Credit provided financing to dealers by purchasing retail installment contracts, (2) Ford Motor Credit provided dealers with forms of credit applications and installment sales contracts, (3) dealers, pursuant to a standing arrangement, typically assigned executed contracts to Ford

Motor Credit within a few days after the sales were consummated, and (4) dealers may obtain prior approval from Ford Motor Credit for customers with marginal credit ratings. In *Sharp* the Seventh Circuit Court held that:

> "Assuming arguendo that Ford and General (the finance companies) were creditors within the meaning of the Act and Regulation Z, we conclude that their statuses were adequately identified to the appellants on the faces of the installment contracts." (615 F.2d 423, 426)

In *Augusta v. Marshall,* 614 F.2d 1085, (6th Cir. 1979), the contract had the same notice of assignment to Ford Motor Credit as in the *Cenance* and *Milhollin* cases, and the facts were nearly identical. The Court held that:

> "We need not decide whether Ford Credit was, as an assignee, a creditor within the meaning of the Regulation and need not decide whether the payment coupon book gave timely notice, if such was required. We determine that Judge Krupansky was correct in holding that the installment contract itself gave adequate notice of Ford Credit's involvement in the transaction." (614 F.2d 1085, 1086).

Hence, the Fifth Circuit Court is in conflict with the Ninth, Seventh and Sixth Circuit Courts as to how the bank is to be identified.

Further, the *Cenance* cases also conflict with the *Official Staff Interpretation of Regulation Z,* 41 Fed. Reg. 41908 (1976), which provides:

> "Although the identification of a creditor is a required disclosure under Section 226.8(a) (Regulation Z), this disclosure does not constitute required 'terminology.'"

In *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 63 L.ed. 2d 22 (1980) this Court held that the Federal

Reserve Board's official staff interpretations are controlling unless they are demonstrably irrational. As stated by this Court:

> "That statutory provision signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative. Moreover, language in the legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." (63 L.ed. 2d 22, 32)

C. Who Must Make Disclosures

There is a conflict as to who must make disclosures.

In the *Cenance* cases the Fifth Circuit Court affirmed the holding of the lower court that Ford Motor Credit was liable for all disclosure violations.

In *Hinkle v. Rock Springs National Bank,* 538 F.2d 295 (10th Cir. 1976), and *Price v. Franklin Investment Co., Inc.,* 574 F.2d 594 (D.C. Cir. 1978) the Tenth and D.C. Circuit Courts held that the financial institution was a creditor in an installment sale transaction and that both the dealer and the financial institution must make disclosures under Section 226.6(d) of the Regulation.

Section 226.6(d) of the Regulation provides:

> "If there is more than one creditor or lessor in a transaction, each creditor or lessor shall be clearly identified and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer or lessee. If two or more creditors or lessors make a joint disclosure, each creditor or lessor shall be clearly identified. *The disclosures required under paragraphs (b) and (c) of Section 226.8 shall be made by the seller if he extends or arranges for the extension of credit . . .*" (Emphasis added)

In *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F.2d 102 (3rd Cir. 1976), the Court found that: (1) the dealer had arranged for a loan for the plaintiff to purchase an automobile, (2) the lender (Princeton) made the consumer loan disclosures to the plaintiff required by Section 129 of the Act, and (3) neither the dealer nor Princeton made the "credit sale" disclosures listed in Section 128 of the Act. The Third Circuit Court held that credit sale disclosure should have been made. The Court stated:

> "In short, we hold that if the transaction is one in which the seller arranges credit, the obligation of disclosure is placed upon him by the third sentence of Regulation Section 226.6(d). In that factual situation the specific direction of the third sentence prevails over the general language limiting the scope of disclosure to items within the creditor's knowledge and the purview of his relationship with the customer." (533 F.2d 102, 105).

Hence, the Fifth, Tenth, and D.C. Circuit Courts are in conflict with the Third Circuit Court and the third sentence of Section 226.6(d) of the Regulation.

D. What Disclosures Must a Bank Make

The Regulation provides specific and differing disclosures for credit sales (Section 226.8(c)) and for loans (Section 226.8(d)).

In the *Cenance* cases the contract between the dealer and buyer purported to give the disclosures required in a credit sale transaction. Since the Fifth Circuit held that Ford Motor Credit was a creditor and liable for all disclosure violations, it must be assumed that the Court determined that Ford Motor Credit should have given credit *sale* disclosures.

This would be consistent with the Fifth Circuit Court's decision in *Meyer's v. Clearview Dodge Sales, Inc.*, 539 F.2d

511 (5th Cir. 1976) where the Court held that the dealer and the financial institution are both creditors and are jointly obligated to make Truth-In-Lending *sale* disclosures.

However, in *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976) where the Court found that the finance company must bear full responsibility for all disclosures required under the Act, the Court held that Truth-In-Lending *loan* disclosures were required and said:

> ". . . As we have discussed, the substance of the transactions is the controlling factor. In that light, we find the arrangement a mere pretext for consumer loans which required disclosure under the Act by both the club and the finance companies. Cf. Twin City Fed. Sav. & Loan Association v. Transamerica Ins. Co., 413 F.2d 494 (8th Cir. 1969)." (532 F.2d 86, 93)

Hence, if banks are deemed to be "creditors," there is a conflict as to whether they are to make *sale* or *loan* disclosures to buyers.

Recharacterizing a sale transaction as a loan transaction, or a loan transaction as a sale transaction, may also cause usury and finance charge problems for dealers and banks. In order to determine if a proper finance charge for a sale or a proper interest rate for a loan is being charged, the party making disclosure must know the nature of the transaction being disclosed.

Finally there is the question of what is best for the consumer.

Is the consumer best served if he receives *loan* disclosure information when he thinks he is entering into a *sale* transaction, or receives *sale* disclosure information when he thinks he is entering into a *loan* transaction, or is he confused?

Is the consumer best served when he is given disclosure information by a party he does not know and with whom he has had no dealings, as is the case when he has talked with the dealer only and has had no contact with the financing institution, or is he confused?

Is the consumer best served if he is given both *sale* and *loan* disclosures, or is he confused?

The admonition of this Court in *Ford Motor Credit Co. v. Milhollin,* (supra) is appropriate:

> ". . . The concept of 'meaningful disclosure' that animates TILA . . . cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . informational overload.' " (63 L.ed. 2d 22, 33)

III

SUMMARY

To summarize:

1. Banks have substantial investments in dealer paper involving many transactions and millions of dollars.

2. Banks need to know what is required of them when purchasing dealer paper.

3. There are conflicting opinions among the Circuit Courts and confusion as to the status and obligations of banks when purchasing dealer paper.

4. Particularly, banks need and should be able to know:

   (A) whether or not they are "creditors" or "assignees,"

   (B) whether or not they are required to be identified as "creditors,"

   (C) who must make disclosures, and

   (D) what, if any, disclosures they must make.

IV

CONCLUSION

The resolution of these matters is important to banks, and CBA respectfully urges this Honorable Court to grant Petitioner's Petition for a Writ of Certiorari in this matter.

Dated: February 11, 1981.

Respectfully submitted:

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No. 80-1205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FORD MOTOR CREDIT COMPANY,
Petitioner,

v.

JANET CENANCE, *et al.*,
Respondents.

AMICUS CURIAE BRIEF OF THE CONSUMER BANKERS ASSOCIATION, AND THE NATIONAL CONSUMER FINANCE ASSOCIATION, AS *AMICI CURIAE*, IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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List of Parties.

JANET CENANCE, *Plaintiff-Appellee,*

v.

BOHN FORD, INC., *Defendant-Appellant,*
FORD MOTOR CREDIT COMPANY, *Defendant-Appellant.*

NICOLE ANTONIO, *Plaintiff-Appellant,*

v.

CANAL MOTORS, INC., *Defendant,*
FORD MOTOR CREDIT COMPANY, *Defendant-Appellee.*

MARION SHROPSHIRE, *Plaintiff-Appellee,*

v.

GEORGE THOMPSON FORD, INC., *Defendant-Appellee,*

v.

FORD MOTOR CREDIT COMPANY, *Defendant-Appellant.*

SOLOMON WIGGS, *Plaintiff-Appellee,*

v.

FORD MOTOR CREDIT COMPANY, *Defendant-Appellant.*

JIMMY W. FARRELL, *Plaintiff-Appellee, Cross-Appellant,*

v.

FRANK JACKSON MOTORS, INC., d/b/a JACKSON AMC-JEEP, *Defendant-Appellant, Cross-Appellee.*

NICHOLAS STRZELECKI, *Plaintiff-Appellee,*

v.

TERRY FORD COMPANY and FORD MOTOR CREDIT COMPANY, *Defendants-Appellants.*

MICHAEL DUANE CULVER, *Plaintiff-Appellee,*

v.

GREENBRIAR LINCOLN MERCURY SALES, INC. and FORD MOTOR CREDIT COMPANY, *Defendants,*
FORD MOTOR CREDIT COMPANY, *Defendant-Appellant.*

DENNIS VISSICHELLI, *Plaintiff-Appellee,*

v.

TERRY FORD COMPANY and FORD MOTOR CREDIT COMPANY, *Defendants-Appellants.*

THOMAS J. ROGERS AND PHYLLIS ROGERS, *Plaintiffs-Appellees*,

v.

FRANK JACKSON LINCOLN-MERCURY and FORD MOTOR CREDIT COMPANY, *Defendants-Appellants.*

Nos. 77-2200, 77-3508, 78-2369, 78-2914, 79-1139, 79-1584, 79-2227, 79-2340, 79-2449 and 79-2672.

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This *amicus curiae* brief, in support of the Petition for a Writ of Certiorari, is filed by *amici curiae* the Consumer Bankers Association, and the National Consumer Finance Association herein collectively referred to as the Associations. Written consent of the parties, to the filing of this brief, is filed with this brief in conformity with Rule 36.1 of the Rules of the Supreme Court of the United States.

INTEREST OF *AMICI CURIAE*

The Consumer Bankers Association (CBA) is a non-profit organization which was organized in 1919 to provide a voice for the retail banking industry. Since that time, the membership of CBA has grown to 360 commercial banks, of all sizes, which are actively engaged in extending consumer credit. Combined, the members of CBA hold over fifty-five percent of all consumer credit outstanding held by commercial banks. The CBA memberships' consumer credit outstandings total more than $72,000,000,000.

The National Consumer Finance Association (NCFA) is the nation's largest trade association serving the consumer finance industry. Founded in 1916, NCFA represents nearly 800 consumer finance and industrial banking companies operating more than 17,000 offices across the United States. NCFA's members hold about 90 percent of the $70 billion in outstanding consumer credit of that industry.

The business of CBA's and NCFA's members involves both making direct loans to consumers and purchasing retail installment sales contracts executed between consumer-buyers and creditor-sellers. The members of CBA and NCFA conduct business in every state in the nation. The Associations' membership's business is highly regulated, by both federal and state statutes and regulations, and is subject to the disclosure requirements of the Federal Truth in Lending Act (TILA)[1] and its implementing Regulation.[2]

The Associations have reviewed the Petitioner's Petition for a Writ of Certiorari and endorse the reasons set forth in the Petition for the granting of the Writ. The issues raised by this case have an impact beyond the scope of operation of the Petitioner corporation.

CBA's and NCFA's interest in the creditor identification issue and the disclosure obligations of multiple creditors is not of recent vintage. The Associations' collective membership has been adversely impacted, and continues to be adversely impacted, by the uncertainty caused by the decision below of the United States Court of Appeals for the Fifth Circuit. As chronicled in Appendix D of the Petition,[3] both

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[1] Truth in Lending Act, Pub. L. No. 90-321, Title I, 82 Stat. 146 (1968), as amended, 15 U.S.C. §1601 *et. seq.* (1974 & Supp. 1980).

[2] 12 C.F.R. Part 226 (1980) (designated "Regulation Z").

[3] *Petition For A Writ of Certiorari,* Appendix D at 104-05 (hereinafter *Petition*).

CBA and NCFA, since the issuance of the decision in *Meyers* v. *Clearview Dodge Sales Inc.*,[4] have been attempting to get corrected the Fifth Circuit's erroneous construction of TILA and Regulation Z. Thus, the Associations are vitally interested in having this Court grant the Petition for a Writ of Certiorari and accept for review the decision of the United States Court of Appeals for the Fifth Circuit.

The Associations are submitting this brief to provide arguments on the national importance of the issues raised in the Petition and on the widespread confusion and uncertainty that is the result of conflicting opinions issued by the United States Courts of Appeal on the very issues in this case.

The arguments presented in this brief address only the appropriate manner of creditor identification and the appropriate status of the parties in these types of financing transactions. This brief, as did the Petition, addresses only issues that have broad impact on, and are of wide implication for, financial institutions.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION.

There are, in general, two basic types of credit transactions which are subject to TILA. Each type of transaction is reflected by its own structural form. The first type is a direct loan where a consumer goes to a creditor, executes loan documents and receives the proceeds of the loan. The second type is retail credit or installment sale credit where a consumer purchases goods or services from a seller on credit, documents the transaction with an installment sales contract which the seller usually later assigns or sells to a financial institution.

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[4] 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977).

The responsibility for TILA disclosures is placed upon the creditor.[5] The time at which creditors must comply with their mandated responsibility is also specified in Regulation Z.

According to the Board of Governors of the Federal Reserve System (hereinafter the Board), at the end of October 1980, total outstandings of consumer installment credit was $305,452,000,000.[6] Of that total outstandings figure, commercial banks held $140,897,000,000 and finance companies held $74,985,000,000.

The Board's figures were further broken down by major type of credit outstanding of which automobile credit was the largest single category at $114,452,000,000. In the automobile credit category, commercial banks had outstanding a total of $60,145,000,000. That 60-plus billion dollars figure was further divided into two categories with $34,557,000,000 in purchased retail installment sales contracts and $25,588,000,000 in direct loans. Of the total automobile credit outstanding of 114-plus billion dollars, finance companies held $33,497,000,000.

Installment sales financing, that is, the purchase by commercial banks and finance companies (herein collectively, financial institutions) of dealer or retailer generated consumer credit contracts, evidencing the credit sale of consumer goods or services has been and is now, as suggested by the amount of such credit outstanding, a well-established practice and desired function of financial institutions. The process by which those financing obligations originate and are placed with financial institutions is as varied as the diversity of the participants in the market. However, although not exhaustive, as a general matter, these financing transactions reflect one of three basic forms.

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[5] 15 U.S.C. §1602(f); Regulation Z, §226.2(s) (defining "creditor").

[6] Board of Governors of the Federal Reserve System, 66 *Federal Reserve Bulletin,* A40 (December 1980). All of the "credit outstanding" figures discussed in this section of the brief are derived from the cited *Bulletin.*

Some dealers and retail sellers have their consumer customers fully execute the retail installment sale contracts, the sellers make the required disclosures, receive the customers' obligation made out in favor of themselves and consummate the credit sale transactions. The dealer or retailer then either sells the individual contracts or assembles packages of such obligations of varying quality and negotiates the sale of the packages with different financial institutions on a weekly, monthly, or other time period depending on cash needs and business practice. This form of transaction is a pure credit sale between the seller, as an extender of credit, and the consumer buyer. That initial buyer-seller transaction is followed by a subsequent assignment or sale of the contracts to a financial institution. This second transaction between the seller and the financial institution is a commercial finance transaction.

There is a second form that the general factual pattern of these transactions may take. There the dealer or retail seller discusses the terms of a cash sale with his potential customer, the consumer-buyer. The dealer or retail seller and his potential customer reach agreement on the essential terms of the cash sale. Then, the consumer may be referred to one or more specific financial institutions. At the financial institution's office, after agreement on the terms of financing, its personnel, in direct contact with the consumer, consummate the credit transaction by filling out loan papers and the required loan disclosure documentation.

In the above form of the transaction, the consumer-buyer uses the proceeds of the loan to pay the seller for the purchase. Since in this form of the transaction, the financial institution directly extends credit to the consumer, it knows the terms of the credit extension and it is equitable to impose on it, as Regulation Z does, the requirement to make loan disclosures.[7] If the seller arranges for the extension of credit,

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[7] The reason that Regulation Z provides a financial institution which extends credit the option to make loan disclosures rather

by participating in the preparation of contract documents, it may thereby fall within the definition of a creditor and become obligated to make the appropriate disclosures.[8]

There is a third form that these financing transactions may take. In this form the originating dealer or retail seller negotiates with the consumer the terms of the credit sale including price, downpayment, payment schedule, finance charge and other credit terms. Before consummating the credit sale, the dealer, for purposes of having the buyer's credit checked and approved, submits the buyer's credit application to a third party financial institution that *may* later become a purchaser of the installment sales contract. This procedure is called pre-clearing or pre-approval of a consumer's creditworthiness.

After the consumer-buyer's credit has been reviewed, the financial institution merely indicates to the credit seller whether or not the seller's contemplated consumer debtor's creditworthiness falls within the range of risk that the financial institution would, as a potential contract purchaser, find acceptable. After communication with the financial institution, the seller and the consumer-buyer either renegotiate the credit terms or consummate the credit sale transaction by executing the retail installment sales contract and by making the underlying obligation payable to the seller of the product or service. The executed retail installment sales contract is later offered for sale to either a specific purchaser or one of several potential contract purchaser financial institutions.

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than credit sale disclosures is that in a credit sale, in addition to all of the information that is disclosed in the consumer loan context, the total cash price, the downpayment and the unpaid cash balance must be disclosed to the consumer. Typically, the latter three items are not known by either a lending or contract purchasing financial institution.

[8] Regulation Z, §§226.2(h), 226.2(s) and 226.6(d).

The characteristics of the above form of transaction are those of credit sales. Even though these transactions have caused confusion in the courts, they are transactions in which there is only one extender of credit, the seller, and the transactions should be disclosed as credit sales. The consolidated cases in this Petition fit squarely within the above form of credit sale transaction.

However, the recharacterization theory as applied by the Fifth Circuit has caused financial institutions, engaging in one or another form of the previously described forms of installment sales financing, substantial uncertainty as to their disclosure obligations and concurrently exposed those same institutions to potentially staggering civil liability.[9]

Conflicting judicial decisions have confused both creditors and subsequent assignees as to who should, and

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[9] Retail sellers and dealers obtain disclosure forms almost exclusively from potential contract purchaser subsequent assignees. Due to the combination of the number of transactions involved, the use of detailed disclosure forms, and the widespread distribution system for forms, *any* change in the law that affects a consumer credit form, including a disclosure change, triggers a substantial changeover process. The extensive process involved must be undertaken with respect to *each* change in the law and *each* affected form.

That changeover process includes legal analysis; review of the suitability of the change for personnel who complete the form; printing new forms; physical distribution of the forms often to a number of different locations, and the retrieval and destruction of obsolete forms; and personnel retraining necessitated by the change. This case illustrates well the problems caused to financial institutions, such as the Petitioner, that finance installment sales on a nationwide basis. If this Court permits this decision of the Fifth Circuit to go unreviewed, the Petitioner's disclosure forms that have been specifically approved by the Sixth, Seventh, and Ninth Circuits would for future use in the Fifth Circuit, have to go through the cumbersome and expensive change process described in this footnote.

with which requirements of TILA, they should comply. The concomitant result of this judicially injected uncertainty is to frustrate Congressional intent, as expressed in the TILA, by denying to consumers uniformly comparable credit information. Therefore, this Court should accept this Petition for a Writ of Certiorari to review the Fifth Circuit's judicially mandated disclosures which are contrary to the TILA, Regulation Z, and the announced position of the Federal Reserve Board's staff.

II.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO SETTLE THE REOCCURRING QUESTION OF WHETHER OR NOT A FINANCIAL INSTITUTION WHICH ACQUIRES A RETAIL INSTALLMENT SALES CONTRACT BY SUBSEQUENT ASSIGNMENT IS IN FACT A CREDITOR AT THE TIME THAT THE UNDERLYING CREDIT TRANSACTION BETWEEN THE SELLER AND THE CONSUMER IS CONSUMMATED.

There is a conflict between the Fifth, Sixth, Seventh and Ninth Circuits on the question of whether a subsequent assignee of a retail installment sales contract must be identified, on the face of the disclosure statement, as an original extender of credit using the particular terminology "creditor" at the time that a credit sale between the seller and consumer is consummated.[10] The underlying issue, and more importantly, the question which should be resolved by this Court is whether or not a financial institution which acquires a retail installment sales contract by subsequent assignment is in fact a creditor at the time that the underlying credit transaction between the seller and the consumer is consummated. Con-

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[10] *Petition* at 11-14. The Associations endorse and agree with the Petitioner's analysis of the cases there cited, and therefore will not repeat that reasoning.

sidering the identified dollar magnitude of such financing which is outstanding,[11] this Court's response to that question is of staggering consequence.

In the instant cases the Fifth Circuit reached the conclusions that the subsequent assignee was in fact an original creditor and that it should have been disclosed as such on the TILA disclosure statement. The Court's erroneous conclusions are predicated, first, on a recharacterization of the status of the subsequent assignee to that of a creditor, and second, on analysis that melds the previously well-established and legally recognized distinctions between credit sales and loan transactions.[12]

The transactions here at issue, as do many other similar credit sales by sellers, followed a disclosure format that is mandated by the express language of the Statute and Regulation read as a whole. The TILA and Regulation Z scheme mandates that these transactions be disclosed as credit sales.

As the previous discussion of the sales finance industry's practice indicates, when a credit sale is consummated there is only one credit extender and no credit arranger. In credit sale transactions, the seller is the party on whom Regulation Z places responsibility for making the required disclosures.

Furthermore, scrutiny of Regulation Z's disclosure timing sequence, contrary to judicial opinions which have not considered its practical implications, leaves no doubt that a creditor must in fact be in existence as a creditor within the purview of a particular transaction in order for it to have any disclosure obligations whatsoever. In both retail installment sales and loan transactions the disclosures must be made either at or prior to consummation.[13]

In the retail installment sales context, before the transaction is consummated there is only one party capable of knowing what credit sale terms and conditions are in need of disclosure and it is that same party who is physically capable

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[11] *Supra* note 6.

[12] *See* pp. 13-14, 18 *infra.*

[13] Regulation Z, §§226.6(a) and 226.8(a).

of delivering the disclosure statement to the consumer. That party is the seller. It is for those practical reasons that Regulation Z places responsibility for credit sale disclosure violations on the seller.[14]

The Fifth Circuit's decision in the instant cases followed, in most respects, that Court's prior decision in *Meyers* v. *Clearview Dodge Sales, Inc.*[15] The precursor of the *Meyers* decision was a group of cases which became known as the health club cases.[16] In those cases, in order to achieve a truth in lending result the courts stretched the principles underlying the TILA.

The general fact pattern in those cases were that the defendant health spas would charge their customers a set fee regardless of whether the customers' payments were immediate and in cash or paid in installments. Because of the four installment rule,[17] the defendants in those cases were required to provide TILA disclosure statements. On the disclosure forms, for finance charge, the defendants had listed "none," and had listed "0%" for the annual percentage rate. The installment sales contracts were then sold to financial institutions.

The courts, applying a conduit theory, agreed with the consumers' claims that in reality, those unitary price contracts were retail installment sales contracts for which the consumers were charged a finance charge at an annual percentage rate based upon the difference between the unitary price charged the consumer, and that price as discounted by the financial institution which subsequently had purchased the installment sales contracts. The courts' underlying concern was that the true cost of the credit was being concealed from the consumer-

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[14] Regulation Z, §226.6(d).

[15] 539 F.2d 551 (5th Cir. 1976).

[16] *Garza* v. *Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972); *Kriger* v. *European Health Spa, Inc.*, 363 F. Supp. 334 (E.D.Wis. 1973); *Joseph* v. *Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D.Mo. 1971), 386 F. Supp. 780 (E.D.Mo. 1974), *rev'd* 532 F.2d 86 (8th Cir. 1976).

[17] 15 U.S.C. §1602(f); Regulation Z, §226.2(s).

customers by burying the cost of the credit in the cost of the sold goods or services. Therefore, the courts fashioned a conduit theory premised on recharacterization of the subsequent assignees' status to that of a creditor in order to preclude the perceived abusive creditor activity.

In considering the applicability of the health club cases to the question of how financial institutions that finance installment sales ought to be treated with respect to TILA disclosure responsibility and liability, it should be noted that their primary thrust was to force what the courts felt was in reality a hidden credit transaction with a buried finance charge to be so identified, and the requisite disclosures to be made. While the response of those courts to situations in which they felt consumers had been provided insufficient information is understandable, the additional recharacterization there of unitary priced installment sales from "four installment" transactions requiring limited disclosures to credit sales, requiring disclosure of finance charges and annual percentage rates, has directly led to the present confusion on the issue of who is the credit extender that must be identified as the creditor on the TILA disclosure statement.

The Fifth Circuit did not recognize the limitation of the rationale of the health club cases and in *Meyers* expanded that rationale beyond the unitary pricing situation and applied it to an issue on which there is neither potential for nor any actual abuse of the purposes underlying the TILA and Regulation Z.[18] Disclosure, on the face of retail installment sales contracts, of the identity of a potential subsequent assignee of such contracts is not required by any provision of either TILA or Regulation Z. Disclosing a potential subsequent assignee's identity, as a creditor, does not provide a consumer with any information which could be used in comparison shopping for credit and in making an informed decision on the use of credit.[19]

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[18] *Meyers*, 539 F.2d at 516, citing *Joseph* v. *Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976).

[19] It has been held, as a matter of law, that identifying on the disclosure statement a potential assignee to whom the contract was

III.

THE PETITION SHOULD BE GRANTED IN ORDER THAT THIS COURT MAY RECONCILE THE CONFLICT BETWEEN THE CIRCUITS ON THE DISCLOSURE OBLIGATIONS OF MULTIPLE CREDITORS.

The Associations agree with the Petitioner's position and its analysis that there now exists a conflict among the Circuit Courts on the specific disclosure responsibilities of multiple creditors in installment sales financing transactions.[20]

The Associations wish to highlight the confusion caused by the conflict in judicial opinions on what specific type of disclosures should be made by the party with the obligation for disclosure.

The Fifth Circuit itself has not been consistent in providing guidance to good faith efforts at compliance by financial institutions attempting to distill, from a myriad of conflicting opinions, what disclosures are mandated in the context of a transaction which is structured as a credit sale to a consumer followed by a subsequent assignment of the retail installment sale contract to a financial institution.

In the Fifth Circuit's previous decision on what specific type of disclosure should be made by a recharacterized subsequent assignee it held that such an assignee *must* make a joint credit sale disclosure with the seller.[21] The Fifth Circuit's lack of internal consistency and its own confusion is demonstrated by its decision in the instant cases. The District Courts both in *Cenance* v. *Bohn Ford, Inc.*,[22] and in *Antonio* v. *Canal*

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not later assigned violated section 226.6(c) of Regulation Z as being misleading. *Clausell* v. *Abraham Lincoln Mercury, Inc.*, Civil Action No. 79-1139 (E.D.La. July 22, 1980), (Reprinted as Appendix E of the *Petition*, at 110-12).

[20] *Petition* at 14-17, and 24-26. *Compare Meyers*, 539 F.2d at 521 *with Joseph* v. *Norman's Health Club, Inc.*, 532 F.2d at 93.

[21] *Meyers*, 539 F.2d at 521, n.22.

[22] 430 F. Supp. 1064 (E.D.La. 1977).

Motors, Inc.,[23] phrased the language of their opinions in mixed credit sale and loan terminology.

The Fifth Circuit's consolidated decision in this case is cast in loan terminology. However, the Fifth Circuit did not expressly indicate what type of disclosures, credit sale or loan, the recharacterized subsequent assignee should have made. The Fifth Circuit's use of loan terminology in *Cenance* indicates that in this case that Court blurred the distinction, expressly recognized in both TILA and Regulation Z, between credit sales and loans. That conclusion is supported because the Court nowhere in its opinion expressly addressed whether the recharacterized subsequent assignee should have made a joint credit sale disclosure with the seller, whether the subsequent assignee should have made a separate credit sale disclosure, or whether the recharacterized subsequent assignee should properly have made loan disclosures.

The Fifth Circuit based its holding that the Petitioner was an original credit extender and that it had violated Regulation Z, section 226.6(d), on a portion of the first sentence of that section.[24]

However, the substantive separate charge itemization violations at issue in these cases were alleged violations of Regulation Z, section 226.4(b). The items requiring disclosure under Regulation Z, section 226.4(b) are typically items that are within the knowledge and purview of a credit extender's personnel as they document the disclosures necessary to consummate a credit transaction. Thus, further support is provided for the conclusion that as a corollary to recharacterizing the status of the parties the Court also, possibly without a full appreciation of the implications of its action, melded the distinction between credit sales and loan transactions as demonstrated by the following:

> Although . . . (15 U.S.C. section 1614) does address the liability of subsequent assignees, the appellants' argument begs the question of whether Ford is truly a "subsequent assignee" in substance rather than form. Simply

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[23] Civil Action No. 74-3163 (E.D.La. November 18, 1977).

[24] *Cenance* v. *Bohn Ford, Inc.*, 621 F.2d 130, 134 (5th Cir. 1980).

> denominating oneself as a subsequent assignee is insufficient. To enjoy the protection of the new provision, the company must be subsequent assignee in fact as well as name. Thus, the status of a *loan participant* is determined by the nature of the participation rather than a designation arbitrarily shown on the *loan* instrument.[25] (Emphasis added).

These decisions from within the Fifth Circuit provide no guidance to financial institutions attempting to comply with TILA and Regulation Z disclosure requirements. The lack of specificity in the court decisions have imposed confusing and conflicting requirements for both creditors and subsequent assignees to comply with and does not benefit consumers who are in need of uniform credit disclosure statements.

This Court should accept this Petition and resolve the conflict between the Circuits, and provide guidance to the Circuits in fashioning disclosure requirements which are consistent with the TILA and Regulation Z.

IV.

THE PETITION SHOULD BE GRANTED IN ORDER FOR THIS COURT TO CONFIRM THE DEFERENCE TO BE ACCORDED TO THE INTERPRETATIONS OF THE FEDERAL RESERVE BOARD.

A. The Federal Reserve Board Has Articulated Consistent Criteria For The Determination Of Creditor Status.

The Federal Reserve Board, in implementing its Congressional mandate,[26] has provided specific guidance on who is a creditor in particular types of credit transactions. In providing its guidance, the Board has first looked to determine who the parties are to a particular consumer credit transaction. In deciding whether someone is a party to a consumer credit transaction, the Board seeks to determine that party's status at a particular point in time.

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[25] *Id.*

[26] 15 U.S.C. §1604.

As far as the Board is concerned, the relevant point in time is that time at which a transaction, either credit sale or loan, is consummated. The time at which a creditor obligates itself to extend credit and its customer obligates himself to utilize that credit is the point in time at which the consumer credit transaction has been consummated.[27] Thus consummation occurs at the moment that a contractual relationship is created between a creditor and its customer.[28] The determination of the existence of a creditor-customer contractual relationship depends on underlying state law.[29]

Once consummation has occurred, the Board's interpretations have examined the specific roles played, at consummation, by each party. The Board looks to whether a seller or dealer, by its activities in relationship to a specific transaction, qualifies as an arranger of credit to be extended by a third party.[30] In determining whether a seller is an arranger of credit, or in fact the true extender of credit at the time a credit sale is consummated, the Board examines whether, at consummation, the credit seller knows to whom, when, and if the underlying retail installment sales contract will be sold.[31]

As the description of the retail installment sales financing industry's practice indicated, at the time credit sales are consummated, the seller does not know if, when, or to whom the underlying contracts will ultimately be sold. In those circumstances, the Board's tendency has been to indicate that

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[27] FRB Public Information Letter No. 344, [1969-1974 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 30,399 (June 4, 1970); FRB Public Information Letter No. 778, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,100 (April 10, 1974).

[28] Regulation Z, §226.2(kk).

[29] FRB Public Information Letter No. 344, *supra* note 27.

[30] Regulation Z, §226.2(h); FRB Public Information Letter No. 778, *supra* note 27; FRB Public Information Letter No. 823, [1974-1977 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 31,145 (July 24, 1974).

[31] FRB Public Information Letter No. 626, [1969-1974 Transfer Binder] *Cons. Cred. Guide (CCH)* ¶ 30,875 (August 10, 1972).

there was only one extender of credit, the seller, at consummation of such transactions.[32]

B. The Fifth Circuit Has Ignored This Court's Precedent Of Ford Motor Credit Company v. Milhollin.

The decisions of the Fifth Circuit, both in this case, and in *Meyers,* substituted judicial disclosure policy in place of the disclosure policy articulated by the Federal Reserve Board's staff. In so doing, the Fifth Circuit rejected the informed and fundamentally consistent interpretation of Regulation Z by the agency charged by Congress with the primary role of interpreting the Statute and Regulation.

In addition to the rejection of the Congressional mandate, the Fifth Circuit ignored the precedent of *Ford Motor Credit Company* v. *Milhollin,*[33] wherein this Court, last term, confirmed the Congressional mandate and articulated the standard of deference to be accorded to the Federal Reserve Board staff's interpretation of Regulation Z. This Court should accept this Petition and confirm the standard of deference to be accorded to the pronouncements of the Federal Reserve Board's staff.

V.

THE PETITION SHOULD BE GRANTED IN ORDER FOR THIS COURT TO PREVENT THE FIFTH CIRCUIT FROM JUDICIALLY RESTRUCTURING LONG STANDING INDUSTRYWIDE PRACTICE OF THE RETAIL INSTALLMENT SALES FINANCING INDUSTRY.

A. The Effect Of The Fifth Circuit's Decision Would Require Changes In The Retail Installment Sales Financing Industry's Business Practice.

In addition to the potential liability and costs associated with the litigation that the combination of the *Meyers* and *Cenance* holdings are producing, those decisions will force financial institutions that are purchasing retail installment

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[32] *Id.*

[33] 444 U.S. 555 (1980).

sales contracts to alter their long-established commercial practice.

At the time that TILA disclosures must be made, sellers and dealers do not know with certainty which among many potential assignees will ultimately purchase a particular retail installment sales contract. Sellers consummate a credit sale transaction with the consumer and then, even if they have previously received pre-approval of a consumer's creditworthiness from one financial institution, they negotiate the sale of the specific installment sale contract among many financial institutions. If, as the *Cenance* decision requires, the identity of a potential future purchaser of retail installment sales contracts has to be disclosed as a creditor on the seller's TILA disclosure statement, credit sellers' practices of negotiating the ultimate sale of installment contracts with more than one financial institution will, out of necessity, have to be abandoned.

The superficial statutory and regulatory analysis engaged in by the Fifth Circuit did not consider the implications of the disclosure mandated by *Meyers* and the specific terminology for that disclosure mandated by *Cenance*. However, other courts, which have considered the same arguments as advanced by consumers to the Fifth Circuit, have considered the practical marketplace ramifications of implementing their holdings. Those courts have asked themselves whether, if a financial institution was identified on a disclosure form as a creditor and as an assignee or whether if a financial institution had separately disclosed itself as a creditor, they would now be faced with the contentions that the status of the financial institution had been ambiguously disclosed, or the contention, in the event of separate disclosures, that the disclosures were inconsistent or not made on the face of one document.[34]

Those questions are not speculative but rather epitomize the pitfalls inherent in the TILA and Regulation Z. As the

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[34] *Sharp* v. *Ford Motor Credit Company*, 452 F. Supp. 465, 468 n.5 (S.D.Ill. 1978), *aff'd* 615 F.2d 423 (7th Cir. 1980).

Clausell[35] decision indicates, some courts will not consider the practical marketplace consequences of their decisions. Thus, as a result of the *Meyers* and *Cenance* decisions, the doors are now wide open to litigation that would, if not checked by this Court's intervention, sacrifice the substance of the TILA to form, and which would tend to cloud the necessary distinction between the concepts of retail installment sales financing and lending.

B. The Effect Of The Fifth Circuit's Decision Would Require Changes In The Structural Form Of The Retail Installment Sales Financing Industry.

The Fifth Circuit failed to recognize that the purchase of retail installment sales contracts as a method of financing is consciously structured in that form for reasons that lie outside the purview of the underlying purpose of TILA and Regulation Z.

Plaintiffs in TILA cases, where the underlying transactions have been credit sales, have been asking the courts to recharacterize the transactions as loans, and have contemporaneously been pleading violations of states' usury laws. Those same plaintiffs urge the federal courts to accept jurisdiction of such claims, in the course of TILA cases, on the basis of pendent jurisdiction in the federal courts to hear such claims.[36]

Although the federal courts have not been inclined to accept such pendent jurisdiction, state courts have concurrent jurisdiction over alleged TILA disclosure violations.[37] State courts have subjected financial institutions to the recharacterization of the underlying transaction theory.[38]

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[35] *Supra* note 19.

[36] *See Price* v. *Franklin Investment Company,* 574 F.2d 594, 596 (D.C. Cir. 1978).

[37] 15 U.S.C. §1640(e).

[38] *Glaire* v. *LaLanne-Paris Health Spa, Inc.,* 12 Cal. 3d 915, 117 Cal. Rptr. 541, 528 P.2d 357, 363 (1974).

Thus, when a federal court renders a TILA decision, even though erroneous, recharacterizing an underlying credit transaction to something other than that denominated by the form adopted by the parties to the transaction, that decision may have persuasive spill over impact on any subsequent state court litigation.[39]

The Fifth Circuit has not given consideration to the underlying substantive state laws which regulate retail installment sales. These laws distinguish between loans by lenders and credit sales by retail sellers and generally provide for different rates of charge for each type of transaction. Certain states have usury statutes which impose a lower interest rate on consumer loans than the permitted finance charge on retail installment sales.[40] When, in the TILA context, a transaction which had originally been structured as the purchase of a retail installment sales contract is recharacterized as a loan transaction, that recharacterization almost certainly means that the finance charge actually imposed in the transaction, on the basis of the rate permissible for credit sales, exceeds the usury statute's interest rate permitted to be charged on loans. Therefore, the finance charge rate for the transaction as recharacterized violates that particular state's usury laws.

However, what the courts that have purported to look through the form of a credit sale to determine whether it is in substance a loan, and therefore subject to the usury statute, have not realized is that they are looking through form not to substance but merely to another kind of form.[41] If permitted

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[39] *Glaire,* 528 P.2d at 362-63 citing the health club cases.

[40] *Compare* Md. Comm. Law Code Ann. (1975) §§12-102, 103 (interest rate ceilings) *with id.* §§12-609, 610 (maximum finance charges); *and compare* Ga. Code Ann. §§57-101, 116 (interest rate ceilings) *with id.* §96-903(d) (maximum finance charges).

[41] Warren, *Regulation of Finance Charges in Retail Instalment Sales,* 68 Yale L.J. 839, 849 (1959).

to flourish, that type of indiscriminate judicial application of usury statutes to credit sales would constrict the flow of capital into the installment sales financing industry. In order to prevent such an occurrence, this Court should confirm the soundness of the established statutory distinctions between retail installment sales financing and lending.

CONCLUSION

The decision of the Fifth Circuit furthers a judicial disclosure policy that is squarely contrary to the TILA and to Regulation Z and interpretations issued by the Federal Reserve Board. This Court should accept the Petition in order to eliminate the conflict in the Circuits on the creditor identification issue and to eliminate the conflict on the disclosure obligation of multiple creditors. More importantly, this Court should address the question of whether or not a subsequent assignee is a creditor at the time that a credit sale is consummated between a seller and a consumer. In answering that question, this Court should provide definitive guidance to the Circuits on the impermissibility of judicially restructuring the retail installment sales financing industry.

Respectfully submitted,

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